UNITED STATES REPORTS

VOLUME 385

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1966

OCTOBER 3, 1966 (BEGINNING OF TERM)
THROUGH JANUARY 23, 1967

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1967

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.

RAMSEY CLARK, Acting Attorney General.*
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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*The Honorable Ramsey Clark, of Texas, who had been Deputy Attorney General, became Acting Attorney General October 3, 1966, on which date former Attorney General Nicholas deB. Katzenbach assumed the office of Under Secretary of State.

380765

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1966.

SENFOUR INVESTMENT CO., INC. *v.* KING COUNTY.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 93. Decided October 10, 1966.

66 Wash. 2d 644, 404 P. 2d 760, appeal dismissed and certiorari denied.

Jerome M. Johnson for appellant.

James E. Kennedy and *William L. Paul, Jr.*, for appellee.

Solicitor General Marshall and *Philip A. Loomis, Jr.*, for the United States, as *amicus curiae*.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JONES *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 102. Decided October 10, 1966.

16 N. Y. 2d 829, 210 N. E. 2d 461, appeal dismissed and certiorari denied.

Ralph B. Raukx for appellant.

John G. Bonomi for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MORRIS PARK, INC. *v.* BUCK.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 113. Decided October 10, 1966.

153 Conn. 290, 216 A. 2d 187, appeal dismissed.

Francis B. Feeley and *James T. Healey* for appellant.

Robert H. Alcorn for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 104. Decided October 10, 1966.

249 F. Supp. 712, affirmed.

Samuel P. Delisi and *Edward A. Kaier* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Charles L. Marinaccio and *Robert W. Ginnane* for the United States et al. *James M. Carter* for appellee Erie-Lackawanna Railroad Co.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

BUCHANAN ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 115. Decided October 10, 1966.

249 F. Supp. 860, appeal dismissed.

Richard M. Markus for appellants.

William B. Saxbe, Attorney General of Ohio, and *Gerald A. Donahue*, First Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

JORDAN ET AL *v.* VILLAGE OF MENOMONEE FALLS.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 122. Decided October 10, 1966.

28 Wis. 2d 608, 137 N. W. 2d 442, appeal dismissed.

Emil Hersh, Arthur Magidson, Joseph A. Fanelli and *James H. Mann* for appellants.

Patrick T. Sheedy for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BENNETT *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 143. Decided October 10, 1966.

Certiorari granted; 174 Ct. Cl. 492, 356 F. 2d 525, vacated and remanded.

Carl L. Shipley for petitioner.

Solicitor General Marshall for the United States.

PER CURIAM.

In light of the suggestion of the Solicitor General and upon an examination of the papers filed in this case, the petition for a writ of certiorari is granted, the judgment of the United States Court of Claims is vacated and the case is remanded to that court.

ANNBAR ASSOCIATES ET AL. *v.* WEST SIDE REDEVELOPMENT CORP. ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 152. Decided October 10, 1966.

397 S. W. 2d 635, appeal dismissed.

William M. Kufeld for appellants.

Guy W. Rice for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GLICK ET AL. *v.* BALLENTINE PRODUCE, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 168. Decided October 10, 1966.

396 S. W. 2d 609, appeal dismissed.

Elwyn L. Cady, Jr., for appellants.

Morris H. Kross, John R. Caslavka, Harry P. Thomson, Jr., and *E. E. Thompson* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

KRONSBEIN *v.* TRUSTEES OF SCHOOLS OF TOWNSHIP THREE ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 183. Decided October 10, 1966.

33 Ill. 2d 575, 213 N. E. 2d 261, appeal dismissed.

Kenneth F. Kelly for appellant.

G. William Horsley for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT NO. 2 ET AL. *v.* GRANT COUNTY PLANNING BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 192. Decided October 10, 1966.

195 Kan. 640, 408 P. 2d 655, appeal dismissed and certiorari denied.

Dale M. Stucky for appellants.

Robert C. Londerholm, Attorney General of Kansas, and *J. Richard Foth*, Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

DOWDLE ET AL. *v.* NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 204. Decided October 10, 1966.

Appeal dismissed and certiorari denied.

John Manning Regan for appellants.

William J. Stevens for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CALCATERRA *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 267. Decided October 10, 1966.

33 Ill. 2d 541, 213 N. E. 2d 270, appeal dismissed and certiorari denied.

Charles A. Bellows for appellant.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

TIETZ ET AL. *v.* MARIENTHAL ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 217. Decided October 10, 1966.

238 Cal. App. 2d 905, 48 Cal. Rptr. 245, appeal dismissed and certiorari denied.

J. B. Tietz for appellants.

Harold W. Kennedy and *Henry F. Walker* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

REYNOLDS, DBA LARRY & KATZ, ET AL. *v.* LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 229. Decided October 10, 1966.

248 La. 639, 181 So. 2d 377, appeal dismissed and certiorari denied.

Saul Stone and *Paul O. H. Pigman* for appellants.

George A. Bourgeois, Clem H. Sehrt and *Peter J. Butler* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

UNITED STATES *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 271. Decided October 10, 1966.

Certiorari granted; 354 F. 2d 549, reversed.

Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander and *J. F. Bishop* for the United States.

William B. Saxbe, Attorney General of Ohio, and *Gerald A. Donahue,* First Assistant Attorney General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Wickard* v. *Filburn,* 317 U. S. 111.

FERRANTE *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 277. Decided October 10, 1966.

Appeal dismissed.

Henry Mark Holzer for appellant.

J. Lee Rankin for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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REED *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 282. Decided October 10, 1966.

33 Ill. 2d 535, 213 N. E. 2d 278, appeal dismissed.

Mort A. Segall for appellant.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

TREFFRY ET AL. *v.* TAYLOR, DIRECTOR OF LICENSES FOR THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 291. Decided October 10, 1966.

67 Wash. 2d 487, 408 P. 2d 269, appeal dismissed.

Francis J. Conklin for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

CAPELOUTO *v.* ORKIN EXTERMINATING CO. OF FLORIDA, INC.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 316. Decided October 10, 1966.

183 So. 2d 532, appeal dismissed.

Wilfred C. Varn for appellant.

J. Lewis Hall for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MASLOWSKY ET AL. *v.* CASSIDY, CHAIRMAN, ILLINOIS HOUSE OF REPRESENTATIVES COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 574. Decided October 10, 1966.

34 Ill. 2d 456, 216 N. E. 2d 669, appeal dismissed.

Albert E. Jenner, Jr., and *Thomas P. Sullivan* for appellants.

Owen Rall for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.

BOOKCASE, INC., ET AL. *v.* LEARY, COMMISSIONER OF POLICE OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 332. Decided October 10, 1966.

18 N. Y. 2d 71, 218 N. E. 2d 668, appeal dismissed.

Emanuel Redfield and *Benjamin E. Winston* for appellants.

J. Lee Rankin and *Frank S. Hogan* for appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.

MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN are of the opinion that the appeal should be dismissed for want of a substantial federal question.

GUY *v.* TAHASH, WARDEN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

No. 169, Misc. Decided October 10, 1966.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed.

NEUMANN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 40, Misc. Decided October 10, 1966.

15 N. Y. 2d 979, 207 N. E. 2d 531, appeal dismissed and certiorari denied.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

McCLELLAN *v.* HUSTON.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 96, Misc. Decided October 10, 1966.

Appeal dismissed and certiorari denied.

Albert E. Savoy for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CROSS *v.* BRUNING, COUNTY CLERK OF SAN MATEO COUNTY, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 134, Misc. Decided October 10, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WAKIN *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 293, Misc. Decided October 10, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BOYDEN *v.* MAY, WARDEN.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 351, Misc. Decided October 10, 1966.

Appeal dismissed.

Appellant *pro se*.

Solicitor General Marshall for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

BRADFORD *v.* HELMAN, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 389, Misc. Decided October 10, 1966.

Appeal dismissed.

Appellant *pro se*.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Brenda Soloff*, Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SPIESEL *v.* ROOS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 390, Misc. Decided October 10, 1966.

Appeal dismissed.

Appellant *pro se.*

Anthony L. Schiavetti for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

BRADFORD *v.* POSTEL, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 402, Misc. Decided October 10, 1966.

Appeal dismissed.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

KEMP *v.* HULTS, COMMISSIONER OF BUREAU OF MOTOR VEHICLES.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 125. Decided October 17, 1966.

17 N. Y. 2d 191, 216 N. E. 2d 592, appeal dismissed and certiorari denied.

Emanuel Redfield for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Michael H. Rauch,* Deputy Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PHELPER *v.* DECKER, SHERIFF.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 374. Decided October 17, 1966.

Certiorari granted; order reversed.

Charles W. Tessmer and *Emmett Colvin, Jr.*, for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted. The order of May 5, 1966, denying the motion for a certificate of probable cause is reversed.

MR. JUSTICE STEWART concurs for the reasons stated in his separate memorandum in *Mapp* v. *Ohio*, 367 U. S. 643, 672.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent and would deny the petition for a writ of certiorari.

McGILL ET AL. *v.* RYALS, SHERIFF, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 381, Misc. Decided October 17, 1966.

253 F. Supp. 374, appeal dismissed.

Vernon Z. Crawford, Morton Stavis, William M. Kunstler, Arthur Kinoy and *Benjamin E. Smith* for appellants.

Truman Hobbs for appellees.

PER CURIAM.

The appeal is dismissed for want of jurisdiction because the case was not appropriate for a three-judge court.

MR. JUSTICE DOUGLAS is of the opinion that a three-judge court was properly convened and would affirm the judgment of the lower court.

ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILWAY TRAINMEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 220. Argued October 10, 1966.—Decided October 24, 1966.

362 F. 2d 649, affirmed.

Paul A. Porter and *Dennis G. Lyons* argued the cause for petitioners. With them on the briefs were *Abe Krash* and *Daniel A. Rezneck.*

Neal Rutledge and *Allan Milledge* argued the cause for respondents. With them on the brief was *Lester P. Schoene.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

GILES ET AL. *v.* FRIENDLY FINANCE CO. OF BILOXI, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 426. Decided October 24, 1966.

185 So. 2d 659, 664, appeal dismissed and certiorari denied.

Albert Sidney Johnston, Jr., for appellants.

Charles B. Henley for appellees Guaranty Loan Corp. of Mississippi et al.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JOHNSON *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 88, Misc. Decided October 24, 1966.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Thomas C. Lynch, Attorney General of California, and *Edward P. O'Brien* and *Lawrence R. Mansir*, Deputy Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

COLORADO-UTE ELECTRIC ASSOCIATION, INC. *v.* WESTERN COLORADO POWER CO. ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 437. Decided October 24, 1966.

159 Colo. 262, 411 P. 2d 785, appeal dismissed and certiorari denied.

John A. Hughes, Raphael J. Moses and *John J. Conway* for appellant.

Francis M. Shea, William H. Dempsey, Jr., and *John R. Barry* for appellees Western Colorado Power Co. et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BRADFORD *v.* GAVAGAN, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 574, Misc. Decided October 24, 1966.

Appeal dismissed.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SWITZERLAND CHEESE ASSOCIATION, INC., ET AL. *v.* E. HORNE'S MARKET, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 42. Argued October 17, 1966.—Decided November 7, 1966.

Petitioners sought a preliminary and permanent injunction in this trademark infringement suit. Following joinder of issues before trial, petitioners filed a motion for summary judgment granting a permanent injunction, which the District Court denied because of unresolved factual issues. The Court of Appeals held that the order denying summary judgment was not an "interlocutory" one under 28 U. S. C. § 1292 (a)(1), which provides for an appeal from an interlocutory order "refusing" an injunction, and dismissed the appeal. *Held:* Since the denial of the motion for summary judgment related only to pretrial procedures and not to the merits, it was not "interlocutory" and therefore not appealable under § 1292 (a)(1).

351 F. 2d 552, affirmed.

David Toren argued the cause for petitioners. With him on the briefs were *John J. McGlew* and *Alfred E. Page.*

Harold E. Cole argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners brought this suit for trademark infringement and unfair competition under the trademark laws. 60 Stat. 427, 15 U. S. C. § 1051 *et seq.* They sought a preliminary injunction during the pendency of the action, a permanent injunction, and damages. After issue was joined, petitioners moved for a summary judgment granting a permanent injunction and awarding damages against respondent. The District Court could not say that there was "no genuine issue as to any material fact"

within the meaning of Rule 56 of the Federal Rules of Civil Procedure which governs summary judgments and accordingly denied the motion. Petitioners appealed, claiming that order to be an "interlocutory" one "refusing" an injunction within the meaning of § 1292 (a)(1) of the Judicial Code, 28 U. S. C. § 1292 (a)(1).[1]

The Court of Appeals held that the order denying the motion for a summary judgment was not an "interlocutory" one within the meaning of § 1292 (a)(1) and dismissed the appeal for want of jurisdiction. 351 F. 2d 552. We granted certiorari because of a conflict between that decision and those from the Second Circuit. See, *e. g., Federal Glass Co.* v. *Loshin,* 217 F. 2d 936.[2]

Unlike some state procedures, federal law expresses the policy against piecemeal appeals. See *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176. Hence we approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders. It is earnestly argued, however, that, although this order denied a permanent injunction, it was nonetheless "interlocutory" within the meaning of § 1292 (a)(1) because the motion for summary judgment did service for a motion for a preliminary injunction (see *Federal Glass Co.* v. *Loshin, supra,* at 938) and that therefore "interlocutory" must also include a denial of a permanent injunction.

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[1] That section provides:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

[2] Subsequent to the grant of certiorari in this case, the Second Circuit, *en banc,* reversed its position and held that such an order is not appealable. *Chappell & Co., Inc.* v. *Frankel,* 367 F. 2d 197.

We take the other view not because "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of § 1292 (a)(1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals.[3]

Affirmed.

MR. JUSTICE HARLAN would affirm the judgment below on the basis of the reasoning set forth in Judge Waterman's opinion for the Second Circuit in *Chappell & Co., Inc.* v. *Frankel*, 367 F. 2d 197.

MR. JUSTICE STEWART concurs in the result.

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[3] As Judge Charles E. Clark said, in dissent, in *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F. 2d 800, at 805–806:

"A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals."

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BLACK *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 1029, October Term, 1965. Certiorari denied May 2, 1966.—Rehearing and certiorari granted and case decided November 7, 1966.

After denial of certiorari in this case, the Solicitor General voluntarily advised that, in connection with another matter, monitoring petitioner's room disclosed conversations between petitioner and his attorney at the time this case was being presented to the Grand Jury. Notes and reports made therefrom were forwarded later to Tax Division attorneys for use in preparation for trial in the case. The Solicitor General also advised that these attorneys did not regard the material as relevant and did not know it included attorney-client conversations and suggested that the judgment be vacated and remanded to the District Court for a hearing at which the material would be produced and the court could determine whether the conviction should stand. In view of the report of the Solicitor General and in order to make certain that petitioner be accorded a trial free from any inadmissible evidence, *held:* The judgment should be vacated and the case remanded for a new trial.

Rehearing and certiorari granted; 122 U. S. App. D. C. 347, 353 F. 2d 885, vacated and remanded.

Hans A. Nathan, Warren E. Magee and *Bert B. Rand* for petitioner.

Solicitor General Marshall for the United States.

PER CURIAM.

In *Davis* v. *United States, post,* p. 927, we today denied the petition for certiorari. The sole question raised there (but not passed upon by the Court of Appeals because not necessary to its disposition) involved petitioners' claim that conferences between petitioners and their counsel were surreptitiously overheard

and intercepted by law enforcement officials through concealed monitorial devices built into the jail where petitioners were being held for federal authorities. The Solicitor General did not deny the existence of the devices but said that there were no recordings of the conversations in question. He pointed out that since the case has been remanded by the Court of Appeals for a new trial on other grounds, a full exploration of this question could be made on retrial. In the light of these representations we denied the petition for certiorari so that the question might be fully explored at the new trial, as suggested by the Solicitor General.

In the instant case, *Black* v. *United States*, the petition for rehearing now raises a similar question and while *Davis* v. *United States*, *supra*, is not controlling, its relation is obvious. In *Black* the Solicitor General advised the Court voluntarily on May 24, 1966, after the petition for certiorari had been denied, 384 U. S. 927, but before an application for rehearing had been filed, that agents of the Federal Bureau of Investigation, in a matter unrelated to this case, on February 7, 1963, installed a listening device in petitioner's hotel suite in Washington, D. C. The device monitored and taped conversations held in the hotel suite during the period the offense was being investigated and beginning some two months before and continuing until about one month after the evidence in this case was presented to the Grand Jury. During that period, "the monitoring agents," the Solicitor General advised, "overheard, among other conversations, exchanges between petitioner and the attorney who was then representing him [Black]" in this case. In a supplemental memorandum filed July 13, 1966, the Solicitor General, in response to an inquiry by the Court, stated that the recordings of such interceptions had been erased from the tapes but that notes summarizing and sometimes

quoting the conversations intercepted were available, and that reports and memoranda concerning the same had been made. "Neither the reports nor the memoranda," he reported, "were seen by attorneys of the Tax Division responsible for the prosecution of" this case until January 1964, when in preparing for trial they were included in material transmitted to them; the reports and memoranda of the intercepted conversations were examined by the Tax Division attorneys and retained by them until April 15, 1964, when petitioner's trial began; and the attorneys never realized until April 21, 1966, that any conversations between Black and his attorney had been overheard and included in the transcriptions.

The Solicitor General advised further that the "Tax Division attorneys found nothing in the F. B. I. reports or memoranda which they considered relevant to the tax evasion case." He suggests that the judgment be vacated and remanded to the District Court in which the "relevant materials would be produced and the court would determine, upon an adversary hearing, whether petitioner's conviction should stand." We have sometimes used this technique in federal criminal cases, *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233. However, its use has never been automatic. Indeed, in *Remmer* v. *United States*, 347 U. S. 227, we found it necessary, despite the hearing in the District Court, to subsequently order a new trial on the merits, 350 U. S. 377. There are other complicating factors here that were not present in *Remmer*. There the judge had been informed of the alleged jury tampering, but here neither the judge, the petitioner nor his counsel knew of the action of the federal agents. Moreover, the Solicitor General advises that the Tax Division attorneys did not know at the time of the trial that conversations between Black and his attorney were included in the transcriptions. In view of these facts it appears that justice requires that a

new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible.

This Court has never been disposed to vacate convictions without adequate justification, but, under the circumstances presented by the Solicitor General in this case we believe that a new trial must be held. This will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved. It will also permit the removal of any doubt as to Black's receiving a fair trial with full consideration being given to the new evidence reported to us by the Solicitor General.

The petition for rehearing is therefore granted, the order denying certiorari vacated, certiorari granted, the judgment of the Court of Appeals vacated and the cause remanded to the District Court for a new trial.

MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The denial of certiorari in No. 245, *Davis* v. *United States*—where the Court of Appeals for the Fifth Circuit has already ordered a new trial on grounds wholly unrelated to alleged eavesdropping and at which trial petitioners will have a full opportunity to explore their contentions that the Government interfered with their constitutionally protected right to counsel—bears no solid relation to, still less furnishes justification for, what the Court has done in the present case. A brief statement of the circumstances of the *Black* disposition will reveal that in summarily vacating this final conviction and ordering a completely new trial the Court has acted prematurely.

In 1964, petitioner Black was convicted in the District Court of federal income tax violations. His conviction was affirmed by the Court of Appeals for the District of Columbia Circuit on November 10, 1965. 122 U. S. App. D. C. 347, 353 F. 2d 885. Certiorari was denied by this Court on May 2, 1966. 384 U. S. 927. Before Black's petition for rehearing was filed here, the Solicitor General filed a memorandum bringing to the Court's attention the fact that in the course of an unrelated criminal investigation Black's hotel suite had been "bugged" by the Federal Bureau of Investigation and conversations between Black and his attorney electronically recorded. The Solicitor General further stated that in consequence of an investigation, instituted by him following his discovery of this occurrence, he was able to represent to the Court that none of the information so procured had been utilized in Black's aforesaid prosecution. In a further memorandum, filed in compliance with a request from this Court, the Solicitor General has represented that it was not until late August 1965 that the Criminal Division of the Department of Justice learned that a listening device had been installed in Black's hotel suite and not until April 21, 1966, that attorneys in the Tax Division, responsible for the prosecution, learned that any conversations between Black and his counsel had been overheard.

The Solicitor General recognizes that Black is entitled to a full exploration of the matter, and to that end suggests that the case be remanded to the District Court for a hearing and findings on the episode in question as it may bear on the validity of Black's conviction. Black responds that this course is inadequate and contends that this Court should, without more, forthwith order dismissal of the indictment in this income tax prosecution.

Without anything more before it than the representations made by both sides, the Court today orders a totally

new trial in spite of the fact that the disclosures commendably made by the Solicitor General reveal no use of "bugged" material in Black's prosecution, and no knowledge by prosecuting attorneys that material may have been improperly obtained. I agree, of course, that petitioner is entitled to a full-scale development of the facts, but I can see no valid reason why this unimpeached conviction should be vacated at this stage. In *Davis, supra,* exploration of the alleged eavesdropping episode is appropriate upon the retrial of the case since the original conviction has already fallen on other grounds. In the *Black* case, however, a new trial is not an appropriate vehicle for sorting out the eavesdropping issue because until it is determined that such occurrence vitiated the original conviction no basis for a retrial exists. The Court's action puts the cart before the horse. The orderly procedure is to remand the case to the District Court for a hearing and findings on the issues in question. See *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233. See also *Remmer* v. *United States,* 347 U. S. 227, 350 U. S. 377. Unless and until the facts on this issue have been resolved and their legal effect assessed favorably to petitioner, this conviction should remain undisturbed.

The only basis I can think of for justifying this decision is that any governmental activity of the kind here in question *automatically* vitiates, so as at least to require a new trial, any conviction occurring during the span of such activity. But I cannot believe that the Court, without even briefing or argument, intends to make any such sweeping innovation in the federal criminal law by today's peremptory disposition of this case.

PITTSBURGH TOWING CO. *v.* MISSISSIPPI VALLEY BARGE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 319. Decided November 7, 1966.

Court's exercise of discretion *held* not warranted to overlook 22-day delay beyond time fixed by its Rule 13 (1) for docketing of appeals, where such delay was inadequately accounted for.

252 F. Supp. 162, appeal dismissed.

Ernie Adamson for appellant.

Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark and *James M. Henderson* for appellees.

PER CURIAM.

The motion to dismiss is granted for failure of appellant to comply with the time requirement of Rule 13 (1) of the Rules of this Court in docketing its appeal. This appeal was docketed 22 days after expiration of the 60-day period provided by the Rule. During that period, appellant made no application for an enlargement of time, either to the District Court or to a Justice of this Court (see Rule 13 (1)), nor did any explanation accompany the untimely docketing of the appeal. The jurisdictional statement itself is silent on the subject. Not until appellee moved to dismiss pursuant to Rule 14 (2) did appellant comment upon its default. Its reply to the Motion to Dismiss states that the "delay was occasioned by a misunderstanding between Counsel for appellant." It does not elaborate.

This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences

of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

MR. JUSTICE BLACK, dissenting.

Due to a misunderstanding among appellant's lawyers this case was not docketed nor was the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13 (1). The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14 (2) because of this error of appellant's lawyers. Rule 14 (2) permits, but does not require, such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court have been injured—as the Court seems to intimate without record support—by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special category of administrative orders is frustrated.

This case is now to take its place among a growing number of others where mere procedural rules have been used to prevent the consideration and determination of cases on their merits. See, *e. g.*, *Lord* v. *Helmandollar*, 121 U. S. App. D. C. 168, 348 F. 2d 780, cert. denied, 383 U. S. 928, BLACK, J., dissenting; *Riess* v. *Murchison*,

cert. denied, 383 U. S. 946, BLACK, J., dissenting; *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636, BLACK, J., joined by THE CHIEF JUSTICE, dissenting; *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 384 U. S. 1004, BLACK, J., dissenting; *Santana* v. *United States, post,* p. 848, BLACK, J., dissenting. I find it inconsistent with a fair system of justice to throw out a litigant's case because his lawyer, due to negligence, or misunderstanding, or some other reason fails to satisfy one of many procedural time limits. If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?

As I have previously stated, "The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits." *Beaufort Concrete Co., supra,* at 1006, BLACK, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13 (1).

KELSEY ET AL. *v.* CORBETT ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, EIGHTH SUPREME JUDICIAL DISTRICT.

No. 475. Decided November 7, 1966.

396 S. W. 2d 440, appeal dismissed.

Boyd Laughlin for appellants.

Thomas C. Wicker, Jr., for appellees Corbett et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CARR *v.* CITY OF ALTUS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

No. 481. Decided November 7, 1966.

255 F. Supp. 828, affirmed.

Waggoner Carr, Attorney General of Texas, *pro se*, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *J. Arthur Sandlin*, *George C. Black, Jr.*, and *Roger Tyler*, Assistant Attorneys General, for appellant.

A. W. Walker, Jr., for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MASSEY *v.* GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 630, Misc. Decided November 7, 1966.

222 Ga. 143, 149 S. E. 2d 118, appeal dismissed and certiorari denied.

Floyd H. Wardlow, Jr., and *John R. Rogers* for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MATRANGA *v.* McDONNELL, SHERIFF.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 686, Misc. Decided November 7, 1966.

Appeal dismissed and certiorari denied.

Albert Sidney Johnston and *John M. Sekul* for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JOS. SCHLITZ BREWING CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 486. Decided November 7, 1966.

253 F. Supp. 129, affirmed.

Leslie Hodson, Hammond E. Chaffetz, Joseph DuCoeur and *Richard J. Archer* for appellant.

Solicitor General Marshall and *Assistant Attorney General Turner* for the United States, and *Burnham Enersen* and *Stephen Grant* for General Brewing Corp., appellees.

Godfrey L. Munter, Jr., for Ray et al., as *amici curiae*, in support of appellant.

PER CURIAM.

The motion of Philip A. Ray et al., for leave to file a brief, as *amici curiae*, is granted.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and would set the case for argument.

November 7, 1966. 385 U. S.

AMALGAMATED TRANSIT UNION, AFL–CIO *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 496. Decided November 7, 1966.*

253 F. Supp. 481, affirmed.

I. J. Gromfine and *Herman Sternstein* for appellant in No. 496.

David Previant and *Herbert S. Thatcher* for appellants in No. 497.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Charles L. Marinaccio, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al. in both cases.

James E. Wilson and *Warren Woods* for American Buslines, Inc., and *Robert J. Corber* for National Association of Motor Bus Owners, appellees in No. 496.

William T. Croft for Overnite Transportation Co. et al., appellees in No. 497.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

*Together with No. 497, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America et al.* v. *United States et al.*, also on appeal from the same court.

ADDERLEY ET AL. *v.* FLORIDA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 19. Argued October 18, 1966.—Decided November 14, 1966.

Petitioners, 32 students, were members of a group of about 200 who on a nonpublic jail driveway, which they blocked, and on adjacent county jail premises had, by singing, clapping, and dancing, demonstrated against their schoolmates' arrest and perhaps against segregation in the jail and elsewhere. The sheriff, the jail's custodian, advised them that they were trespassing on county property and would have to leave or be arrested. The 107 demonstrators refusing to depart were thereafter arrested and convicted under a Florida trespass statute for "trespass with a malicious and mischievous intent." Petitioners contend that their convictions, affirmed by the Florida Circuit Court and the District Court of Appeal, deprived them of their "rights of free speech, assembly, petition, due process of law and equal protection of the laws" under the Fourteenth Amendment. *Held:*

1. The Florida trespass statute, here applied to a demonstration on the premises of a jail, which is built for security purposes and is not open to the public, is aimed at conduct of a limited kind and is not unconstitutionally vague as were the common-law, breach-of-the-peace statutes invalidated in *Edwards* v. *South Carolina*, 372 U. S. 229, and *Cox* v. *Louisiana*, 379 U. S. 536, 559. Pp. 41–43.

2. The doctrine of abatement is inapplicable here. *Hamm* v. *City of Rock Hill*, 379 U. S. 306, distinguished. P. 43.

3. The abstract proposition that petty criminal statutes may not be used to violate minorities' constitutional rights is irrelevant to this case. P. 44.

4. There was ample evidence to support petitioners' trespass convictions for remaining on jail grounds reserved for jail uses after they had been directed to leave by the sheriff. There was no evidence at all that petitioners were arrested or convicted for their views or objectives. Pp. 44–48.

175 So. 2d 249, affirmed.

Richard Yale Feder argued the cause for petitioners. With him on the brief was *Tobias Simon.*

William D. Roth, Assistant Attorney General of Florida, argued the cause for respondent, *pro hac vice,* by special leave of Court. With him on the brief was *Earl Faircloth,* Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners, Harriett Louise Adderley and 31 other persons, were convicted by a jury in a joint trial in the County Judge's Court of Leon County, Florida, on a charge of "trespass with a malicious and mischievous intent" upon the premises of the county jail contrary to § 821.18 of the Florida statutes set out below.[1] Petitioners, apparently all students of the Florida A. & M. University in Tallahassee, had gone from the school to the jail about a mile away, along with many other students, to "demonstrate" at the jail their protests of arrests of other protesting students the day before, and perhaps to protest more generally against state and local policies and practices of racial segregation, including segregation of the jail. The county sheriff, legal custodian of the jail and jail grounds, tried to persuade the students to leave the jail grounds. When this did not work, he notified them that they must leave, that if they did not leave he would arrest them for trespassing, and that if they resisted he would charge them with that as well. Some of the students left but others, including petitioners, remained and they were arrested. On appeal the convictions were affirmed by the Florida Circuit Court and then by the Florida District Court of Appeal, 175 So. 2d 249. That being the highest state court to which they could appeal, petitioners applied to us for certiorari

[1] "Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars." Fla. Stat. § 821.18 (1965).

contending that, in view of petitioners' purpose to protest against jail and other segregation policies, their conviction denied them "rights of free speech, assembly, petition, due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States." On this "Question Presented" we granted certiorari. 382 U. S. 1023. Petitioners present their argument on this question in four separate points, and for convenience we deal with each of their points in the order in which they present them.

I.

Petitioners have insisted from the beginning of this case that it is controlled by and must be reversed because of our prior cases of *Edwards* v. *South Carolina*, 372 U. S. 229, and *Cox* v. *Louisiana*, 379 U. S. 536, 559. We cannot agree.

The *Edwards* case, like this one, did come up when a number of persons demonstrated on public property against their State's segregation policies. They also sang hymns and danced, as did the demonstrators in this case. But here the analogies to this case end. In *Edwards*, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not. The demonstrators at the South Carolina Capitol went in through a public driveway and as they entered they were told by state officials there that they had a right as citizens to go through the State House grounds as long as they were peaceful. Here the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff. More importantly, South Carolina sought to prosecute its State Capitol demonstrators by charging them with the common-law crime of breach of the peace.

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This Court in *Edwards* took pains to point out at length the indefinite, loose, and broad nature of this charge; indeed, this Court pointed out at p. 237, that the South Carolina Supreme Court had itself declared that the "breach of the peace" charge is "not susceptible of exact definition." South Carolina's power to prosecute, it was emphasized at p. 236, would have been different had the State proceeded under a "precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed" such as, for example, "limiting the periods during which the State House grounds were open to the public . . . ." The South Carolina breach-of-the-peace statute was thus struck down as being so broad and all-embracing as to jeopardize speech, press, assembly and petition, under the constitutional doctrine enunciated in *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308, and followed in many subsequent cases. And it was on this same ground of vagueness that in *Cox* v. *Louisiana*, *supra*, at 551–552, the Louisiana breach-of-the-peace law used to prosecute Cox was invalidated.

The Florida trespass statute under which these petitioners were charged cannot be challenged on this ground. It is aimed at conduct of one limited kind, that is, for one person or persons to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary.

Petitioners seem to argue that the Florida trespass law is void for vagueness because it requires a trespass to be "with a malicious and mischievous intent . . . ." But these words do not broaden the scope of trespass so as to make it cover a multitude of types of conduct as does the common-law breach-of-the-peace charge. On the contrary, these words narrow the scope of the offense.

The trial court charged the jury as to their meaning and petitioners have not argued that this definition, set out below,[2] is not a reasonable and clear definition of the terms. The use of these terms in the statute, instead of contributing to uncertainty and misunderstanding, actually makes its meaning more understandable and clear.

II.

Petitioners in this Court invoke the doctrine of abatement announced by this Court in *Hamm* v. *City of Rock Hill,* 379 U. S. 306. But that holding was that the Civil Rights Act of 1964, 78 Stat. 241, which made it unlawful for places of public accommodation to deny service to any person because of race, effected an abatement of prosecutions of persons for seeking such services that arose prior to the passage of the Act. But this case in no way involves prosecution of petitioners for seeking service in establishments covered by the Act. It involves only an alleged trespass on jail grounds—a trespass which can be prosecuted regardless of the fact that it is the means of protesting segregation of establishments covered by the Act.

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[2] " 'Malicious' means wrongful, you remember back in the original charge, the State has to prove beyond a reasonable doubt there was a malicious and mischievous intent. The word 'malicious' means that the wrongful act shall be done voluntarily, unlawfully and without excuse or justification. The word 'malicious' that is used in these affidavits does not necessarily allege nor require the State to prove that the defendant had actual malice in his mind at the time of the alleged trespass. Another way of stating the definition of 'malicious' is by 'malicious' is meant the act was done knowingly and willfully and without any legal justification.

" 'Mischievous,' which is also required, means that the alleged trespass shall be inclined to cause petty and trivial trouble, annoyance and vexation to others in order for you to find that the alleged trespass was committed with mischievous intent." R. 74.

III.

Petitioners next argue that "petty criminal statutes may not be used to violate minorities' constitutional rights." This of course is true but this abstract proposition gets us nowhere in deciding this case.

IV.

Petitioners here contend that "Petitioners' convictions are based on a total lack of relevant evidence." If true, this would be a denial of due process under *Garner* v. *Louisiana*, 368 U. S. 157, and *Thompson* v. *City of Louisville*, 362 U. S. 199. Both in the petition for certiorari and in the brief on the merits petitioners state that their summary of the evidence "does not conflict with the facts contained in the Circuit Court's opinion" which was in effect affirmed by the District Court of Appeal. 175 So. 2d 249. That statement is correct and petitioners' summary of facts, as well as that of the Circuit Court, shows an abundance of facts to support the jury's verdict of guilty in this case.

In summary both these statements show testimony ample to prove this: Disturbed and upset by the arrest of their schoolmates the day before, a large number of Florida A. & M. students assembled on the school grounds and decided to march down to the county jail. Some apparently wanted to be put in jail too, along with the students already there.[3] A group of around 200 marched

[3] The three petitioners who testified insisted that they had not come to the jail for the purpose of being arrested. But both the sheriff and a deputy testified that they heard several of the demonstrators present at the jail loudly proclaim their desire to be arrested. Indeed, this latter version is borne out by the fact that, though assertedly protesting the prior arrests of their fellow students and the city's segregation policies, none of the demonstrators carried any signs and upon arriving at the jail, no speeches or other verbal protests were made.

from the school and arrived at the jail singing and clapping.[4] They went directly to the jail-door entrance where they were met by a deputy sheriff, evidently surprised by their arrival. He asked them to move back, claiming they were blocking the entrance to the jail and fearing that they might attempt to enter the jail. They moved back part of the way, where they stood or sat, singing, clapping and dancing, on the jail driveway and on an adjacent grassy area upon the jail premises. This particular jail entrance and driveway were not normally used by the public, but by the sheriff's department for transporting prisoners to and from the courts several blocks away and by commercial concerns for servicing the jail. Even after their partial retreat, the demonstrators continued to block vehicular passage over this driveway up to the entrance of the jail.[5] Someone called the sheriff who was at the moment apparently conferring with one of the state court judges about incidents connected with prior arrests for demonstrations. When the sheriff returned to the jail, he immediately inquired if all was safe inside the jail and was told it was. He then engaged in a conversation with two of the

[4] There is no evidence that any attempt was made by law enforcement officers to interfere with this march, or, for that matter, that such officers even knew of the march or its ultimate destination.

[5] Although some of the petitioners testified that they had no intention of interfering with vehicular traffic to and from the jail entrance and that they noticed no vehicle trying to enter or leave the driveway, the deputy sheriff testified that it would have been impossible for automobiles to drive up to the jail entrance and that one serviceman, finished with his business in the jail, waited inside because the demonstrators were sitting around and leaning against his truck parked outside. The sheriff testified that the time the demonstrators were there, between 9:30 and 10 Monday morning, was generally a very busy time for using the jail entrance to transport weekend inmates to the courts and for tradesmen to make service calls at the jail.

leaders. He told them that they were trespassing upon jail property and that he would give them 10 minutes to leave or he would arrest them. Neither of the leaders did anything to disperse the crowd, and one of them told the sheriff that they wanted to get arrested. A local minister talked with some of the demonstrators and told them not to enter the jail, because they could not arrest themselves, but just to remain where they were. After about 10 minutes, the sheriff, in a voice loud enough to be heard by all, told the demonstrators that he was the legal custodian of the jail and its premises, that they were trespassing on county property in violation of the law, that they should all leave forthwith or he would arrest them, and that if they attempted to resist arrest, he would charge them with that as a separate offense. Some of the group then left. Others, including all petitioners, did not leave. Some of them sat down. In a few minutes, realizing that the remaining demonstrators had no intention of leaving, the sheriff ordered his deputies to surround those remaining on jail premises and placed them, 107 demonstrators, under arrest. The sheriff unequivocally testified that he did not arrest any persons other than those who were on the jail premises. Of the three petitioners testifying, two insisted that they were arrested before they had a chance to leave, had they wanted to, and one testified that she did not intend to leave. The sheriff again explicitly testified that he did not arrest any person who was attempting to leave.

Under the foregoing testimony the jury was authorized to find that the State had proven every essential element of the crime, as it was defined by the state court. That interpretation is, of course, binding on us, leaving only the question of whether conviction of the state offense, thus defined, unconstitutionally deprives petitioners of their rights to freedom of speech, press, assembly or petition. We hold it does not. The sheriff, as jail custodian,

had power, as the state courts have here held, to direct that this large crowd of people get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose.[6] Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate . . . ." Such an argument has as its major unarticulated premise the assumption

[6] In *Cox* v. *Louisiana*, *supra*, at 558, the Court emphasized: "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . . ."'"

that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *Louisiana*, *supra*, at 554–555 and 563–564.[7] We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

These judgments are *Affirmed.*

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE FORTAS concur, dissenting.

The First Amendment, applicable to the States by reason of the Fourteenth (*Edwards* v. *South Carolina*, 372 U. S. 229, 235), provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These rights, along with religion, speech, and press, are preferred rights of the Constitution, made so by reason of that explicit guarantee and

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[7] "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. . . . A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." 379 U. S., at 554–555.

"The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." *Id.*, at 563.

what Edmond Cahn in Confronting Injustice (1966) referred to as "The Firstness of the First Amendment." [1] With all respect, therefore, the Court errs in treating the case as if it were an ordinary trespass case or an ordinary picketing case.

The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself (*Edwards* v. *South Carolina, supra*) is one of the seats of government, whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest. The right to petition for the redress of grievances has an ancient history [2] and

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[1] "Where would we really find the principal danger to civil liberty in a republic? Not in the governors as governors, not in the governed as governed, but in the governed unequipped to function as governors. The chief enemies of republican freedom are mental sloth, conformity, bigotry, superstition, credulity, monopoly in the market of ideas, and utter, benighted ignorance. Relying as it does on the consent of the governed, representative government cannot succeed unless the community receives enough information to grasp public issues and make sensible decisions. As lights which may have been enough for the past do not meet the needs of the present, so present lights will not suffice for the more extensive and complex problems of the future. Heretofore public enlightenment may have been only a manifest desideratum; today it constitutes an imperative necessity. The First Amendment, says Justice Black, 'reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal.' [From *Feldman* v. *United States*, 322 U. S. 487, 501 (dissenting opinion).]" Cahn, *supra*, at 102.

[2] The historical antecedents of the right to petition for the redress of grievances run deep, and strike to the heart of the democratic philosophy. C. 61 of the Magna Carta provided:

"[T]hat if we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one, or shall have transgressed any of the articles of peace or security; and the wrong shall have been shown to four barons of the aforesaid twenty-five barons, let those four barons come to us or to our justiciar, if we

is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. See *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 429–431. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television

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are out of the kingdom, laying before us the transgression, and let them ask that we cause that transgression to be corrected without delay." Sources of Our Liberties 21 (Perry ed. 1959).

The representatives of the people vigorously exercised the right in order to gain the initiative in legislation and a voice in their government. See Pollard, The Evolution of Parliament 329–331 (1964). By 1669 the House of Commons had resolved that "it is an inherent right of every commoner of England to prepare and present Petitions to the house of commons in case of grievance," and "That no court whatsoever hath power to judge or censure any Petition presented . . . ." 4 Parl. Hist. Eng. 432–433 (1669). The Bill of Rights of 1689 provided "That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal." Adams & Stephens, Select Documents of English Constitutional History 464. The right to petition for a redress of grievances was early asserted in the Colonies. The Stamp Act Congress of 1765 declared "That it is the right of the British subjects in these colonies, to petition the king or either house of parliament." Sources of Our Liberties 271 (Perry ed. 1959). The Declaration and Resolves of the First Continental Congress, adopted October 14, 1774, declared that Americans "have a right peaceably to assemble, consider their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." *Id.*, at 288. The Declaration of Independence assigned as one of the reasons for the break from England the fact that "Our repeated Petitions have been answered only by repeated injury." The constitutions of four of the original States specifically guaranteed the right. Mass. Const., Art. 19 (1780); Pa. Const., Art. IX, § 20 (1790); N. H. Const., Art. 32 (1784); N. C. Const., Art. 18 (1776).

and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

There is no question that petitioners had as their purpose a protest against the arrest of Florida A. & M. students for trying to integrate public theatres. The sheriff's testimony indicates that he well understood the purpose of the rally. The petitioners who testified unequivocally stated that the group was protesting the arrests, and state and local policies of segregation, including segregation of the jail. This testimony was not contradicted or even questioned. The fact that no one gave a formal speech, that no elaborate handbills were distributed, and that the group was not laden with signs would seem to be immaterial. Such methods are not the *sine qua non* of petitioning for the redress of grievances. The group did sing "freedom" songs. And history shows that a song can be a powerful tool of protest. See *Cox* v. *Louisiana*, 379 U. S. 536, 546–548. There was no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine; things went on as they normally would. None of the group entered the jail. Indeed, they moved back from the entrance as they were instructed. There was no shoving, no pushing, no disorder or threat of riot. It is said that some of the group blocked part of the driveway leading to the jail entrance. The chief jailer, to be sure, testified that vehicles would not have been able to use the driveway. Never did the students locate themselves so as to cause interference with persons or vehicles going to or coming from the jail. Indeed, it is undisputed that the sheriff and deputy sheriff, in

separate cars, were able to drive up the driveway to the parking places near the entrance and that no one obstructed their path. Further, it is undisputed that the entrance to the jail was not blocked. And whenever the students were requested to move they did so. If there was congestion, the solution was a further request to move to lawns or parking areas, not complete ejection and arrest. The claim is made that a tradesman waited inside the jail because some of the protestants were sitting around and leaning on his truck. The only evidence supporting such a conclusion is the testimony of a deputy sheriff that the tradesman "came to the door . . . and then did not leave." His remaining is just as consistent with a desire to satisfy his curiosity as it is with a restraint. Finally, the fact that some of the protestants may have felt their cause so just that they were willing to be arrested for making their protest outside the jail seems wholly irrelevant. A petition is nonetheless a petition, though its futility may make martyrdom attractive.

We do violence to the First Amendment when we permit this "petition for redress of grievances" to be turned into a trespass action. It does not help to analogize this problem to the problem of picketing. Picketing is a form of protest usually directed against private interests. I do not see how rules governing picketing in general are relevant to this express constitutional right to assemble and to petition for redress of grievances. In the first place the jailhouse grounds were not marked with "NO TRESPASSING!" signs, nor does respondent claim that the public was generally excluded from the grounds. Only the sheriff's fiat transformed lawful conduct into an unlawful trespass. To say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government, not to private proprietors.

The Court forgets that prior to this day our decisions have drastically limited the application of state statutes inhibiting the right to go peacefully on public property to exercise First Amendment rights. As Mr. Justice Roberts wrote in *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516:

> ". . . Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

Such was the case of *Edwards* v. *South Carolina*, where aggrieved people "peaceably assembled at the site of the State Government" to express their grievances to the citizens of the State as well as to the legislature. *Supra*, at 235. *Edwards* was in the tradition of *Cox* v. *New Hampshire*, 312 U. S. 569, where the public streets were said to be "immemorially associated" with "the right of assembly and the opportunities for the communication of thought and the discussion of public questions." *Id.*, at 574. When we allow Florida to construe her "malicious trespass" statute to bar a person from going on property knowing it is not his own and to apply that prohibition to public property, we discard *Cox* and *Edwards*. Would the case be any different if, as is common, the demonstration took place outside a building which housed both the jail and the legislative body? I think not.

There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put. See *Cox* v. *New Hampshire, supra; Poulos* v. *New Hampshire,* 345 U. S. 395. But this is quite different from saying that all public places are off limits to people with grievances. See *Hague* v. *C. I. O., supra; Cox* v. *New Hampshire, supra; Jamison* v. *Texas,* 318 U. S. 413, 415–416; *Edwards* v. *South Carolina, supra.* And it is farther yet from saying that the "custodian" of the public property in his discretion can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble and petition for redress of grievances. See *Hague* v. *C. I. O., supra; Schneider* v. *State,* 308 U. S. 147, 163–164; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Niemotko* v. *Maryland,* 340 U. S. 268; *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87. For to place such discretion in any public official, be he the "custodian" of the public property or the local police commissioner (cf. *Kunz* v. *New York,* 340 U. S. 290), is to place those who assert their First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government. Such power is out of step with all our decisions prior to

today where we have insisted that before a First Amendment right may be curtailed under the guise of a criminal law, any evil that may be collateral to the exercise of the right, must be isolated and defined in a "narrowly drawn" statute (*Cantwell* v. *Connecticut, supra,* at 307) lest the power to control excesses of conduct be used to suppress the constitutional right itself. See *Stromberg* v. *California,* 283 U. S. 359, 369; *Herndon* v. *Lowry,* 301 U. S. 242, 258–259; *Edwards* v. *South Carolina, supra,* at 238; *N. A. A. C. P.* v. *Button, supra,* at 433.

That tragic consequence happens today when a trespass law is used to bludgeon those who peacefully exercise a First Amendment right to protest to government against one of the most grievous of all modern oppressions which some of our States are inflicting on our citizens.

What we do today disregards the admonition in *De Jonge* v. *Oregon,* 299 U. S. 353, 364–365:

> "These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach-of-the-peace statute, a vagrancy statute will be put to the same end.[3] It is said that the sheriff did not make the arrests because of the views which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit. The charge against William Penn, who preached a nonconformist doctrine in a street in London, was that he caused "a great concourse and tumult of people" in contempt of the King and "to the great disturbance of his peace." 6 How. St. Tr. 951, 955. That was in 1670. In modern times, also, such arrests are usually sought to be justified by some legitimate function of government.[4] Yet by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us.

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[3] In 1932 over 28,000 veterans demanding a bonus marched on Washington, D. C., paraded the streets, and camped mostly in parks and other public lands in the District, Virginia, and Maryland only to be routed by the Army. See Waters, B. E. F. (1933).

[4] See, *e. g.*, *De Jonge* v. *Oregon*, 299 U. S. 353; *Feiner* v. *New York*, 340 U. S. 315; *Niemotko* v. *Maryland*, 340 U. S. 268; *Edwards* v. *South Carolina*, 372 U. S. 229; *Cox* v. *Louisiana*, 379 U. S. 536; *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87. The same is true of other measures which inhibit First Amendment rights. See, *e. g.*, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *City of Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479; *N. A. A. C. P.* v. *Button*, 371 U. S. 415. If the invalidity of regulations and official conduct curtailing First Amendment rights turned on an unequivocal showing that the measure was intended to inhibit the rights, protection would be sorely lacking. It is not the intent or purpose of the measure but its effect on First Amendment rights which is crucial.

ILLINOIS CENTRAL RAILROAD CO. ET AL. *v.* NORFOLK & WESTERN RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 15. Argued October 11, 1966.—Decided November 14, 1966.*

Appellants, seven railroads, applied to the Interstate Commerce Commission (ICC) for authority to provide direct service to the Lake Calumet Harbor Port, which is being developed by the Chicago Regional Port District as a major deep water port facility for traffic via the St. Lawrence Seaway. The Port area is now served directly by only Rock Island, which along with the nearest rail facility, Nickel Plate (later merged into the Norfolk & Western), intervened in opposition to the proposed expansion of rail service. The applications sought approval of trackage extension as well as an unexecuted agreement between appellants and the Port District for operations within the Port area. After a full hearing, the Hearing Examiner recommended approval of appellants' entire project. The ICC adopted the recommendations but ruled that the applicants should file supplemental applications covering Port area operations as provided in the proposed lease with the Port District. The supplemental applications covering the lease were filed, an exclusive operating clause to which the ICC had objected having been eliminated. The ICC, finding that the public convenience and necessity required the additional services applied for by appellants, approved the applications, as supplemented, without a further hearing which the Rock Island and Nickel Plate had requested, the ICC having concluded that the previous hearing record was adequate to support the entire project. A second supplemental application was later filed clarifying the rental provision which in the ICC's view required no further hearing as requested by those railroads. The Rock Island and Nickel Plate sued to enjoin the ICC's orders, which a three-

*Together with No. 17, *Calumet Harbor Terminals, Inc., et al.* v. *Norfolk & Western Railway Co. et al.* and No. 20, *United States et al.* v. *Norfolk & Western Railway Co. et al.*, also on appeal from the same court.

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judge District Court set aside as not supported by sufficient evidence. The District Court also found that due process required that Rock Island and Nickel Plate be granted a hearing on the rental provisions. The court ordered a hearing on all the issues. *Held:*

1. The ICC's action granting appellant railroads' applications to provide additional service was supported by "substantial evidence" on the record viewed as a whole as to the Port's future potential and the need for providing competitive rail service at the outset of the Port's development. It was not the District Court's function to substitute its own conclusions for those which the ICC had fairly drawn from its findings. Pp. 65–69.

2. During the proceedings before the Hearing Examiner and the ICC, the operations of the appellants within the Port area were fully considered as an integral part of their overall plan, and the District Court had no basis for concluding that due process required a new hearing on the issues. Pp. 70–75.

241 F. Supp. 974, reversed and remanded.

William J. O'Brien, Jr., argued the cause for appellants in Nos. 15 and 17. With him on the brief in No. 15 were *Robert H. Bierma* and *Edmund A. Schroer*. With him on the brief in No. 17 was *Charles B. Myers*.

Richard A. Posner argued the cause for the United States et al. in No. 20. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro* and *Robert W. Ginnane*.

Theodore E. Desch argued the cause for appellees in all cases. With him on the brief were *Martin L. Cassell, Don McDevitt, John L. Bordes, Reuben L. Hedlund* and *Robert A. Deane*.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court, 241 F. Supp. 974, setting aside orders of the Interstate Commerce Commission, 307 I. C. C. 493, 312 I. C. C. 277, 317 I. C. C. 502, which granted the

applications of seven railroads[1] to provide additional rail service to the Lake Calumet Harbor Port near the southern limits of Chicago, Illinois. The service was to be provided through the construction of a single line of track into the Chicago Regional Port District for the joint use of the seven railroads. At present the port is served directly by only one railroad, appellee Chicago, Rock Island and Pacific Railroad Company (Rock Island). Appellee New York, Chicago and St. Louis Railroad Company (Nickel Plate),[2] has facilities on the east side of Lake Calumet which has been reserved for future commercial development, but at present its facilities do not reach the port. The court, with one judge dissenting, rejected as not having "ample support" in the record, the findings of the Commission that the public convenience and necessity required the additional service applied for by the seven roads. It further found, unanimously, that the requirements of due process were violated by the Commission in its refusal to give Rock Island and Nickel Plate a hearing before approving a nonexclusive agreement, subsequently executed between the applicant roads and the Port District, covering the use of the latter's facilities. The court ordered a new hearing on all the issues, one judge concluding that such hearing should be limited to the subsequently executed nonexclusive use agreement. We noted probable jurisdiction, 382 U. S. 913, and reverse the judgment.

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[1] Illinois Central Railroad Company; Pennsylvania Railroad Company; Chicago South Shore and South Bend Railroad; Belt Railway Company of Chicago; the New York Central Railroad Company; and the Indiana Harbor Belt Railroad Company. The Michigan Central Railroad Company sought additional trackage approval but had not signed a proposed lease with the Port District as the other appellants had.

[2] The Nickel Plate has merged into the Norfolk and Western Railway Company since this proceeding began.

I.

Background of Lake Calumet Harbor Port.

Lake Calumet Harbor Port is one of seven facilities within the Port of Chicago available for the handling of water-borne freight. It is a shallow lake approximately two miles in length and covers approximately 1,250 acres. It is accessible by water from Lake Michigan via the Calumet River into the heart of the Chicago switching district, a distance of some six miles.

As early as 1880 one of the Pullman companies constructed trackage that first brought rail service to Lake Calumet. Pullman reserved some 300 to 500 acres for the development of a harbor and later donated some acreage to the United States for the development of a turning basin. Comprehensive plans for dredging Lake Calumet harbor and the filling of submerged lands were prepared in 1916 by an engineer for the City of Chicago. In 1917 Pullman waived riparian rights to some four miles of Lake Calumet shoreline to the City of Chicago and in 1935 gave additional land to the United States for the purpose of widening the Calumet River.

In 1947 the Illinois Central, an appellant here, attempted to enter the port area. Pullman and two of the seven appellants here, New York Central and the Belt Railway Company of Chicago, opposed the application which was addressed to the Illinois Commerce Commission. In 1949, during the pendency of the proceeding, Rock Island acquired the common stock and certain industrial property of Pullman for $2,200,000. Rock Island then entered the proceedings in opposition to Illinois Central. The application of the latter was approved by the Illinois Commerce Commission but the Circuit Court of Cook County rejected it and the Supreme Court of Illinois affirmed in 1953. *Chicago, R. I.*

& P. R. Co. v. *Illinois Commerce Commission ex rel. Illinois Central R. Co.*, 414 Ill. 134, 111 N. E. 2d 136.

The Interstate Commerce Commission in approving the acquisition of Pullman by Rock Island—over the objections of Illinois Central and the Belt Railway Company, each of which also sought to acquire Pullman or a portion of its trackage on the lake—imposed certain conditions on Rock Island designed to guarantee fair practices, assure nondiscriminatory handling of the traffic of other railroads to and from the lake and guarantee the mutuality of traffic and operating relationships theretofore existing between Pullman and the other roads. Rock Island, however, continued to be the only line providing direct service to the port.

The Chicago Regional Port District was created as a municipal corporation by the State of Illinois in 1951. Its purpose was the development of Lake Calumet into a major deep water port facility for both domestic and import-export traffic via the St. Lawrence Seaway. In 1954 the Port District declared by resolution that the public's, as well as the port's, interest required that its trackage be accessible to as many railroads as possible. In 1955 the Port District acquired the lake and some adjoining property from the City of Chicago and began dredging the lake and constructing port facilities at its southern end; it also built 14 miles of railroad yard "hold" tracks in the port, docks, two 6,500,000-bushel grain elevators, three transit sheds occupying 300,000 square feet of space, a back-up warehouse with 200,000 square feet of space, and streets. These facilities cost $24,000,000 and were paid for by the sale of Port District revenue bonds. By contract with the Port District the Rock Island operates over the trackage of the Port District and also serves the Calumet Harbor Terminals, Inc., a private harbor facility. No other railroads reach the port on their own tracks. The Nickel

Plate is the nearest rail facility. As previously noted, it has trackage on the east side of the lake which has been reserved for future development by the Port District. Any railroad wishing to service the port must use the facilities of Rock Island.

II.

The Applications Before the Commission.

On October 22, 1956, the appellants Illinois Central Railroad Company and the Pennsylvania Railroad Company, requested authority from the Commission under the provisions of 49 U. S. C. § 1 (18) to construct 1.431 miles of new track that would connect their lines to the present trackage of an affiliate of Illinois Central that passes near Lake Calumet's southwestern shore. Similar applications were subsequently filed by the Chicago South Shore and South Bend Railroad, the Belt Railway Company of Chicago, the Michigan Central Railroad Company, the New York Central Railroad Company and the Indiana Harbor Belt Railroad Company. All of the applicants sought to operate directly to and from the Lake Calumet port, rather than use the facilities of the Rock Island. The latter, as well as the Nickel Plate, requested and was given leave to intervene as were other parties.[3] The Rock Island and Nickel Plate were the only objectors, the remaining intervenors all supporting the applications.

The original applications of the seven railroads did not specifically request authority from the Commission to operate over the Port District's tracks. It appears that appellants were under the impression that formal Commission authority was not necessary because of the

[3] Others included: the Secretary of Agriculture, the Port District, the Chicago Board of Trade, the Chicago Association of Commerce and Industry, and two private companies operating on the lake, Calumet Harbor Terminals, Inc., and North Pier Terminal Company.

fact that Rock Island was currently operating without it. Nevertheless, the applications covered the entire plan of operations proposed by appellants, including activity within the Port District as well as an unexecuted agreement covering the leasing of the Port District facilities which was attached to the application as an exhibit. This lease was before the Hearing Examiner during the 12-day joint hearing he conducted and was the subject of testimony and consideration. The appellants advised, and the Hearing Examiner concluded, that the appellants sought approval to operate within the Port District, as well as authority for the track extension. Accordingly, the Hearing Examiner recommended to the Commission that the entire project of the appellants be approved.

On October 5, 1959, the Commission adopted the Hearing Examiner's recommendations but ruled that the applicants should file supplemental applications covering their proposed operations within the Port District, as provided in the proposed lease with the District. The Commission discussed the lease and indicated that it was satisfactory. It did, however, feel that the exclusive right of operation clause should be eliminated. The Commission also ruled that Rock Island's service to Calumet Harbor Terminals, Inc., was not to be disrupted and that every industry located at Lake Calumet Harbor was to have direct rail service, not only from the applicants but the Rock Island and Nickel Plate, if they so elected.

In April 1960, the appellants, pursuant to the Commission's requirement, filed supplemental applications for specific authority to operate within the Port District. The proposed lease covered by these applications eliminated the exclusionary provisions to which the Commission had objected. Despite the request of Rock Island and Nickel Plate for a hearing on the new lease the Com-

mission found that the "technical deficiency" existing in appellants' original applications had been corrected by the filing of their supplemental applications; that the record of the previous hearing was adequate to support approval of the entire proposal of the appellants; and the applications, as supplemented, were approved.

In June 1961, however, the appellants and the Port District found it necessary to amend their operating agreement and appellants filed a second supplemental application asking for approval of the same. This agreement modified the one previously approved by the Commission. The old agreement had provided for a 5% annual rental for the use of the Port District's rail facilities based upon the valuation of the latter, but not to exceed $2 per car, loaded or empty, including locomotives. The new agreement provided for a flat charge of $2 for each loaded freight car; it also specifically eliminated industry-owned tracks within the Port District from the agreement; and provided that it did not affect the right of Rock Island to operate in the Port District nor grant any exclusive privilege to the appellants. The Commission, after once again denying appellees' request for a hearing, approved this final agreement on November 26, 1962. The Commission found that the changes merely clarified the rights and responsibilities of the parties. As to the rentals it found that "rentals generally may be considered reasonable where, as here, the facts of record disclose that nonaffiliated parties, after bargaining at arm's length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired." [4]

[4] 317 I. C. C. 502, 505.

III.

Proceedings in the District Court.

The Rock Island and Nickel Plate then filed this suit seeking to enjoin the Commission's orders and the three-judge District Court vacated the orders on the grounds we have stated.

The court found that it was faced with two basic problems: (1) whether there was "substantial evidence" to support the order of the Commission and (2) whether the refusal of the Commission to have a hearing on the lease agreement between the applicants and the Port District denied Rock Island and Nickel Plate due process of law.

With respect to the first problem the court found "substantial support" for some of the "important findings" of the Commission. However, it found that the record did not "offer ample support" for certain of its conclusions. These conclusions appeared to have been drawn by the Commission from the prior findings which the court had found to have "substantial support" in the record.

On the supplemental application for authority to operate within the Port District the court held there was insufficient evidence to support the order of approval; that the rental under the final contract was materially different from the provisions of the original plan and bound the Rock Island and Nickel Plate to operate under the same condition without affording them the right of a hearing. By a divided court it ordered a complete rehearing on all issues. We cannot agree with either the findings of the District Court or with its disposition of the case.

IV.

Applicable Standard on Review.

At the outset the Commission and the appellant railroads contend that the court did not apply the correct standards in reviewing the Commission's action. As we

have noted, the court did reject certain "conclusions" of the Commission, as above indicated, with respect to the public convenience and necessity for additional rail service to Lake Calumet port on the ground that they did not have "ample support" in the record. The test on judicial review is, of course, whether the action of the Commission is supported by "substantial evidence" on the record viewed as a whole, 5 U. S. C. § 1009 (e)(5). Substantial evidence is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300 (1939). A careful reading of the opinion leads us to conclude that the court was applying the test of substantiality. Indeed, at four separate places in the opinion it uses the term "substantial evidence" as being the necessary requirement. As unfortunate as it is that the "ample support" language crept into the decision, we do not believe that the court was creating a "novel formulation" but rather inadvertently used the "ample support" terminology merely to meet the same language in the dissent referring to the conclusions of the Commission.

We have concluded that the court erred in setting aside the conclusions of the Commission. The Act authorizes the issuance of certificates such as the ones sought here when the Commission finds that the future public convenience and necessity will require additional railroad service. 49 U. S. C. § 1 (18). This Court has repeatedly held that if a railroad, voluntarily proposing the extension of its lines, can show that its proposal "either presently or in the reasonably near future will be self-sustaining, or so nearly so as not unduly to burden interstate commerce, the Commission may issue a certificate authorizing the proposed line," *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*,

288 U. S. 14, 37 (1933). The Commission, however, "must be convinced that the proposed venture will not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates." *Ibid.* Also see *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277 (1926); *Chesapeake & O. R. Co.* v. *United States*, 283 U. S. 35, 42 (1931). Rock Island and Nickel Plate contend that the "evidence [of appellants] adduced before the Commission was so totally devoid of factual possibility as to be no evidence at all." As we read it, the evidence as to the future possibilities of the port was somewhat conflicting. The Commission, in keeping with its duty, resolved this conflict. Indeed, the findings of the Commission, which were upheld by the District Court, completely refute the Rock Island and Nickel Plate claims. Among the findings approved by the court [5] are the following: The port was "the major deepwater port facility of the port of Chicago," with "unparalleled access" to barge, rail, lake steamer and motor transportation and "complete access to ocean transportation" in the immediate future, with 71,490,510 tons of water-borne traffic in 1955 and with "material increases" [6] in tonnages predicted for the future from

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[5] *Norfolk & Western R. Co.* v. *United States*, 241 F. Supp. 974, 977.

[6] The testimony was that rail traffic to and from the port in 1960 would be 27,000 carloads which could easily increase to 76,500 carloads in 1962, 115,000 carloads in 1968 and anywhere from 250,000 to 350,000 carloads a year when both sides of the lake are completed. There was also much testimony as to grain shipments. The seven States of Indiana, Illinois, Iowa, Missouri, Kansas, Nebraska and Colorado in 1956 produced 43% of all the wheat and 51% of the corn grown in the United States. The existing disparity in rates will divert much grain from Atlantic and Gulf ports for movement via Chicago and the St. Lawrence Seaway. Service to the port by

among an estimated 600 to 900 vessels coming to the Chicago port each season, that "will necessitate a substantially broadened railroad service into and out of the Lake Calumet port"; appellants' combined yard capacity was 61,601 cars, more than 12 times that presently available at the port; appellants' routing would be "more direct," entail less handling, expedite shipments and be less expensive than the present operation of Rock Island; and, finally, it was "imperative . . . that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion." We believe that these findings, in the light of others not overturned by the District Court, are sufficient to sustain the Commission's action in issuing the certificates.

Moreover, we believe that the District Court erred in striking down the conclusions of the Commission. These conclusions [7] included: Consideration of the whole record warranted the finding that the applications should be granted; granting them would result in greater rail competition, better service, greater car supply and lower rates for the industries served by the port; appellants would be "on a par" with the Rock Island in solicitation of grain traffic, and by having control of their cars they could return empties in a fast shuttle service to country elevators without interchange with Rock Island; the time has come when additional freight service is required for the future development of the Port District; better service can be given through elimination of delays, by single-line hauls or more direct hauls; a single trunkline rail-

one railroad does not appear adequate since the railroads serving the midwest grain-producing States terminate in Chicago and have extensive switching and classification yards which could be utilized.

[7] 241 F. Supp. 974, 979.

road service would be detrimental and a hindrance to the development of the harbor, and, although the port is served by some 100 common carrier trucklines, the Rock Island is the only railroad presently serving the port; the future convenience and necessity must be given "a higher value" than the present convenience and necessity; the proposed construction either presently or in the reasonably near future is necessary to meet a public need and will be reasonably profitable; and, finally, considering the expansion program at the port and the increased rail traffic to be made available the Commission is "of the opinion that the additional service . . . is warranted." As we have said, these conclusions were largely based upon previous Commission findings which the District Court approved. The Commission's function is to draw such reasonable conclusions from its findings as in its discretion are appropriate. As we said in *Consolo* v. *Federal Maritime Comm'n,* 383 U. S. 607, 620 (1966), "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial, *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474 (1951). Having found that there was substantial support in the record for the Commission's findings as to the port's future potential and the necessity of providing competitive rail service at the outset of the port's development, it was not the District Court's function to substitute its own conclusions for those which the Commission had fairly drawn from such findings. Its agreement with the controlling subsidiary findings required the District Court to sustain the Commission's conclusions.

The court also erred, we believe, in ordering a new hearing on the issues. It found that the Commission's order issuing a certificate of public convenience and necessity to operate within the Port District was not supported by sufficient evidence and violated due process in that a hearing was not afforded the appellees thereon.

As we view the original applications of the appellants they proposed "to extend their operations to serve the Lake Calumet Harbor District near Chicago, in Cook County, Illinois . . . future industries, elevators, warehouses, docks and piers in the Calumet Harbor Port area." The prayer was that "your Commission issue a certificate of public convenience and necessity authorizing the construction and operation for which authority is herein sought." [8] The proceeding came on for a hearing before the Hearing Examiner on September 30, 1957, and counsel for the Rock Island stated for the record that his understanding was "the issue in this case is that all applications are for the purpose of handling *import* and *export* business only *to and from* the Port District Harbor of Chicago . . . ." (Emphasis supplied.) And counsel for the appellants stated that the plan was "to handle interstate business to and from the area over which the port has jurisdiction. We have no such limitation at all as to import or export trade." Likewise, the "Return to Questionnaire" executed by appellants stated: "The line proposed to be constructed and operated will receive material revenue from freight traffic to be handled to and from industries, elevators, warehouses, docks, and piers presently operating in the Calumet Harbor Port area, in addition to those facilities to be constructed with the

[8] Application of Illinois Central, Pennsylvania, and Chicago South Shore and South Bend railroads filed October 19, 1956, with the Interstate Commerce Commission.

further development of the area." [9] To make it crystal clear paragraph 10 of the same answer to the questionnaire stated:

> "The Lake Calumet Port District, which the proposed line will serve is currently served by the Chicago, Rock Island and Pacific Railroad Company by virtue of its acquisition of the Pullman Railroad Company, through purchase of capital stock, and lease by the former of the railroad property of the latter approved and authorized by the Commission in Finance Docket No. 16252, *Pullman Railroad Company Control,* decided November 17, 1949."

The other applications had similar allegations and the other appellants' questionnaire returns contained like statements. Moreover, the answers filed on May 16, 1957, by Rock Island and Pullman to the applications, addressed themselves solely to the proposition that "applicant's extension of its line of railroad and operations through trackage rights to serve territory [the Port District] heretofore served exclusively and adequately by petitioners cannot be supported by public convenience and necessity, could mean only a duplication of rail service, and would create unsound and uneconomic conditions in transportation."

As we read the record before the Hearing Examiner the case was tried on the theory that the applications included the proposed operations within the Port District. During the presentation of appellants' evidence objection was made to the introduction of the proposed lease between appellants and the Port District on the ground that it was beyond the scope of the application. The Hearing Examiner overruled the objection. The testimony of virtually all of the appellants' witnesses was

[9] Return of Illinois Central, Pennsylvania, and the Chicago South Shore and South Bend, R. 17.

directed to some phase of the operations of the Port District. It should also be noted that the appellees sought to rebut this testimony in voluminous detail. For example, 40 pages of the record detail the testimony of Mr. R. C. Davidson, a witness for Rock Island. His testimony is devoted to Rock Island's operation in the United States with specific reference to the Port District. It compares Rock Island's operation in the Port District with that proposed by the appellants and answers in detail the statistics of the appellants as to charges, rates, switching problems, etc., involved in operations within the Port District. Page after page of prepared statistics on the costs, profits, etc., of the proposed operation were included in the testimony, together with forecasts as to the impact of the same, if permitted, on Rock Island's operations. Another witness for Rock Island, Professor Marvin L. Fair, testified for some 15 pages on the potential of the Port District. His research was in great depth and included comparisons with other Great Lakes ports; estimated traffic of the Port District, including iron ore, grain, and general cargo; physical conditions of navigation at the port; the effect of tolls; the capacity of the Welland Canal (in the St. Lawrence Seaway) and its impact on the port; the efficiency of the port facilities; established movement of exports and imports; the effect of political, military, and economic conditions at home and abroad and the adequacy of Rock Island's service.

The record establishes beyond a doubt that the appellants were in fact seeking Commission approval of the entire project. Their offering of the unexecuted, proposed contract into evidence is one of many indications of this fact. The Hearing Examiner specifically noted, at the time the contract was received in evidence, that its approval by the Commission was necessary in order for the appellants to serve the Port District as they proposed. It would, indeed, have been a futile act for the appellants

to seek and attain approval to extend their lines to the Port District but not be able to enter it!

It is true that appellees objected to the introduction of the proposed agreement because they felt, and rightly so, that the application which the appellants had submitted was not technically broad enough for the authority they sought. The Hearing Examiner overruled them and they were obliged to—and did—offer their evidence on the matter. When the question came before the Commission for decision, it ruled that the applications were technically deficient and permitted the parties to correct the same through the filing of supplemental applications. At no time did the Commission find that the proposal to operate within the Port District had not been adequately explored and examined. Rather, a careful reading of the Commission's entire opinion leads us to the opposite conclusion. At every stage of the proceedings before the Hearing Examiner and also before the Commission, operations of the appellants within the Port District were considered an integral part of the overall plan which they submitted.

The ruling of the Commission that the supplemental applications should be considered in "conjunction with the original application," did not, in our view, deprive appellees of due process of law. When appellees requested a full hearing on the supplemental applications the grounds they alleged were that they were adequately serving the port; that they were prepared to spend further sums of money in the construction of facilities to serve it; that they were entitled to retain the traffic of the Port District; that there was no adequate reason for extension of the railroad lines of appellants into territory heretofore served exclusively by appellees; and that the extension of the railroad lines of appellants was not justified by public convenience and necessity. As the Commission itself found, "Examination of the record discloses

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that these are the same arguments and contentions that were set forth in protestants' original briefs, exceptions to the examiner's proposed report, in their petitions for reconsideration, and in their oral arguments." *Illinois Central R. Co. Construction and Trackage,* 312 I. C. C. 277, 280.

The changes in the proposed lease agreement which the Commission approved without a further hearing involved the removal of the "exclusive right to operate within the Port" clause, which that document had given the appellants, and the formula for determining the annual rental to be charged by the Port District. As to the former, it can hardly be maintained that this worked a hardship or detriment upon the appellees. The removal of the clause, in fact, made certain that appellees were not precluded from continuing their present operations. As to the rental clause, it will be remembered that the original proposed agreement provided for 5% annual rental based on the value of the land and tracks, but not to exceed $2 per car. This was changed in the first supplemental application to a charge of not to exceed $2 per revenue car or locomotive. The final contract merely provided for a charge of $2 for each revenue car, which was much more favorable to the appellants than either of the former clauses. Moreover, the final charge compared favorably to other per-car rates previously approved by the Commission. In the light of these considerations, as well as the fact that appellees were invited and refused to sit in on the negotiation of the contract; had ample opportunity and did present their evidence as to the reasonableness of the charge for the use of Port District property; were, and are, in nowise bound by the contract; and, finally, in view of the insignificance of the changes in the final agreement compared with the former ones, we are led to conclude that appellees were not entitled to another hearing.

Appellees also insist that a new hearing be held so that evidence of "present conditions" could be presented to the Commission rather than "speculation." It is true that this case has been pending for 10 years but this, rather than being a reason for holding additional hearings, operates to the contrary. We have concluded that the orders of the Commission were proper under the circumstances. We have found substantial support for its actions. Accordingly, it is our view that this matter be concluded.

The judgment is therefore reversed and the case is remanded to the District Court with directions to sustain the Commission's orders. *It is so ordered.*

MR. JUSTICE BLACK, dissenting.

The District Court set aside an order of the Interstate Commerce Commission on the ground that the evidence failed to support its findings of fact. I dissent from the Court's reversal of that holding. In *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488, it was said that "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." In the case here the District Court found that it could not conscientiously support the Commission's findings and I would affirm its judgment, adhering to the principles so firmly announced in *Universal Camera, supra.*

CICHOS *v.* INDIANA.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 45. Argued October 19, 1966.—Decided November 14, 1966.

Following trial of petitioner on two counts for reckless homicide and for involuntary manslaughter, the jury found him guilty of reckless homicide. The State Supreme Court granted him a new trial and he was retried on both counts, the second jury returning the same verdict as the first. The same prison sentence as before and a lower fine were imposed. The State Supreme Court affirmed, rejecting petitioner's contention that the first jury's silence on the manslaughter charge constituted an acquittal and that retrial on that count had unconstitutionally subjected petitioner to double jeopardy. *Held:* The writ of certiorari is dismissed as improvidently granted. Pp. 77–80.

(a) Under Indiana law the acknowledgedly overlapping offenses of involuntary manslaughter and reckless homicide (which carries a lesser penalty) are treated more as one offense with different penalties than as a greater and an included offense. A final judgment of conviction of one bars prosecution for the other, and if there is a conviction for both offenses, a penalty can be imposed for only one. Pp. 78–79.

(b) As the Indiana Supreme Court held, because of the identity of the elements of the two crimes and the known trial court practice of instructing the jury to return a verdict on but one of the charges, the jury's silence on the involuntary manslaughter count was not tantamount to acquittal, the reckless homicide verdict encompassed the elements of involuntary manslaughter, and petitioner was given the lesser penalty. Pp. 79–80.

Reported below: — Ind. —, 208 N. E. 2d 685; — Ind. —, 210 N. E. 2d 363.

John P. Price argued the cause for petitioner. With him on the brief were *Cleon H. Foust* and *John B. McFaddin.*

Douglas B. McFadden, Deputy Attorney General of Indiana, argued the cause for respondent, *pro hac vice,* by special leave of Court. With him on the brief was *John J. Dillon,* Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Following petitioner's trial in the Circuit Court for Parke County, Indiana, under a two-count affidavit charging him with reckless homicide and involuntary manslaughter, the jury returned a verdict reciting only that he was guilty of reckless homicide. Petitioner was sentenced to one to five years in prison and was fined $500 plus court costs. He appealed, and the Supreme Court of Indiana granted a new trial. Petitioner was retried on both counts, and the second jury returned the same verdict as the first. He was again sentenced to one to five years in prison but was fined only $100 plus court costs. The Supreme Court of Indiana affirmed this reckless homicide conviction, rejecting petitioner's contention that his retrial on the involuntary manslaughter count had subjected him to double jeopardy in violation of the Indiana and United States Constitutions.[1]

Asserting that the first jury's silence with respect to the manslaughter charge amounted to an acquittal under Indiana law and that his retrial on that charge placed him twice in jeopardy, compare *Green* v. *United States*, 355 U. S. 184, petitioner, in his petition for certiorari which we granted, presented a single question: Is the Fifth Amendment's prohibition against placing an accused in double jeopardy applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

Because of the following considerations, which have more clearly emerged after full briefing and oral argument, we do not reach the issue posed by the petitioner and dismiss the writ as improvidently granted.

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[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amend. 5. "No person shall be put in jeopardy twice for the same offense." Ind. Const., Art. I, § 14.

1. The Indiana statutes define involuntary manslaughter as the killing of "any human being . . . involuntarily in the commission of some unlawful act." Ind. Stat. Ann. § 10–3405 (1956). The statutory penalty is two to 21 years' imprisonment.[2] The crime of reckless homicide, created in 1939 as part of Indiana's comprehensive traffic code, is committed by anyone "who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person." Ind. Stat. Ann. § 47–2001 (a) (1965). For this crime, a fine and a prison term of from one to five years are authorized.

Recognizing the inherent overlap between these two crimes in cases of vehicular homicide, the Indiana Legislature has provided that

> "[A] final judgment of conviction of one [1] of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one [1] offense only." Ind. Stat. Ann. § 47–2002 (1965).

The Indiana courts have also recognized that reckless homicide "is a form of involuntary manslaughter," *Rogers* v. *State*, 227 Ind. 709, 715, 88 N. E. 2d 755, 758. Proof of reckless homicide necessarily establishes an unlawful killing that amounts to involuntary manslaughter. Both crimes require proof of the same elements to sustain a conviction under Indiana law. See *Rogers* v. *State, supra; State* v. *Beckman*, 219 Ind. 176, 37 N. E.

[2] Indiana adopted the common-law crime of involuntary manslaughter early in its history. The crime has traditionally been applied by the Indiana courts to cases of vehicular accidents resulting in death. *E. g., Smith* v. *State*, 186 Ind. 252, 115 N. E. 943 (auto accident); *State* v. *Dorsey*, 118 Ind. 167, 20 N. E. 777 (railroad accident).

2d 531. Thus, the effect of charging the two crimes in a single affidavit, as occurred in this case, was to give the jury the discretion to set the range of petitioner's sentence at two to 21 years by convicting him of involuntary manslaughter or at one to five years by convicting him of reckless homicide. As the Indiana Supreme Court in the case before us explained, "[t]he offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter." — Ind. —, —, 208 N. E. 2d 685, 688.

2. Petitioner does not assert that he should not have been tried again for reckless homicide. His only claim is that he should not have been tried again for involuntary manslaughter as well as reckless homicide because the jury's silence at his first trial with respect to involuntary manslaughter was legally an acquittal on this charge.

However, the Indiana Supreme Court squarely rejected this interpretation of the first jury's verdict. The court distinguished a long line of Indiana cases which have held that a jury's silence must be deemed an acquittal.[3] Because of the identity of the elements of these two crimes, and because the Indiana Supreme Court knew of "the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty,"[4] *id.*, at —, 208 N. E.

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[3] This doctrine developed in response to contentions that silence on any count required the setting aside of the entire verdict under the common-law rule that a defendant has an absolute right to a jury verdict on all charges for which he is tried. See *Weinzorpflin* v. *State*, 7 Blackf. 186 (Ind. 1844). Since a reckless homicide conviction is a statutory bar to further prosecution for involuntary manslaughter, § 47-2002, *supra*, petitioner cannot be adversely affected by the jury's silence with respect to the involuntary manslaughter count.

[4] The judge's charge to the jury in the first trial is not a part of the record in this case.

2d, at 687, the court concluded that "a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter." *Id.*, at —, 208 N. E. 2d, at 688–689. Therefore, "[T]he logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction . . . . Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless homicide verdict encompassed the elements of involuntary manslaughter, and that appellant was simply given the lesser penalty." *Id.*, at —, 208 N. E. 2d, at 687.

In the light of the Indiana statutory scheme and the rulings of the Indiana Supreme Court in this case, we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy. Consequently, we do not reach or decide the question tendered by the petition for certiorari, and the writ is dismissed as improvidently granted.

It is so ordered.

While concurring in the Court's opinion, MR. JUSTICE BLAC adheres to his dissent in *Bartkus* v. *Illinois*, 359 U. S. 121, 150, to the effect that the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

If this were a federal case, it would, in my view, be covered by *Green* v. *United States*, 355 U. S. 184 (1957). In *Green*, the defendant was not acquitted of the first degree murder charge at the first trial. Just as in the

present case, the jury did not return a verdict on that count, but convicted Green on the lesser charges of arson and second degree murder. But this Court held that Green could not be retried on the first degree murder charge. It clearly and unmistakably held that whether Green was "acquitted" of the greater offense was of no consequence. He had been exposed to jeopardy. See 355 U. S., at 188, 190–191. So, in the present case, it is of no consequence whether the silence of the jury on the involuntary manslaughter count amounted to acquittal. Petitioner was put in jeopardy on that count and cannot again be tried on that charge.

The only difference between *Green* and the present case—except as to the jurisdictions—is that in *Green*, on the second trial, the defendant was convicted on the aggravated count. In the present case, petitioner was again convicted on the less serious charge. I cannot see that this can justify a difference in result. Petitioner should not have been retried on an affidavit including the more serious charge, which was not involved in the appeal. That charge was dead—beyond resuscitation. Its wrongful inclusion in the affidavit was materially harmful to petitioner. First, it exposed him to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966). And beyond the question of injury to the petitioner in this particular case is the fact that the procedure which Indiana used chills the right of appeal. It "has the necessary effect of unlawfully burdening and penalizing the exercise of the right to seek review of a criminal conviction." *United States*

v. *Ewell*, 383 U. S. 116, 130 (1966) (dissenting opinion). Defendants in Indiana in this type of case are admonished that if they appeal from a conviction on the less onerous charge they do so at the peril that on the next trial they may be tried, and possibly convicted, on the more serious count.

This is a state case. But the Fourteenth Amendment's requirement of due process, in my view, certainly and clearly includes a prohibition of this kind of heads-you-lose, tails-you-lose trial and appellate process. See the dissent of MR. JUSTICE BLACK in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959); *Brock* v. *North Carolina*, 344 U. S. 424, 429, 440 (1953) (dissenting opinions of Vinson, C. J., and DOUGLAS, J.).

The Second Circuit's views are in accordance with the position stated herein. See *United States ex rel. Hetenyi* v. *Wilkins*, *supra*.

I would reverse and remand.

Syllabus.

UNITED GAS PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 49. Argued October 19–20, 1966.—Decided November 14, 1966.

Petitioner, United Gas Pipe Line Co. (United), contracted to buy gas produced by respondent Continental Oil Co. (Continental) from the Johnson Bayou Field in Louisiana. Continental constructed delivery facilities, and United provided facilities to receive the gas into its interstate system. The contract parties on application to respondent Federal Power Commission (FPC) were granted certificates of public convenience and necessity. Continental's certificate covered sale of Johnson Bayou gas; United's certificate covered construction of its facilities and continued transportation of the gas. Continental elected to terminate at the end of the contract's primary term, refused United's offer to continue purchasing on a day-to-day basis at the old contract rate, and filed with the FPC a rate increase effective on the contract expiration date which was accepted over United's protest. United, after notice to Continental, ceased purchasing Johnson Bayou gas on the contract expiration date. Following Continental's petition for a show-cause order and a full hearing, the FPC found United's ceasing to take gas from that field an abandonment of its facilities for that purpose and of its service rendered thereby, in violation of § 7 (b) of the Natural Gas Act, which forbids such abandonments without the FPC's prior consent. The FPC issued an order, thereafter upheld by the Court of Appeals, that United renew operation of its Johnson Bayou facilities and buy gas at Continental's new rate. *Held:* Petitioner's refusal to continue receiving Johnson Bayou gas for transportation in interstate commerce constituted an abandonment of "facilities" and "service" which, under § 7 (b) of the Act, required FPC approval. Pp. 86–91.

(a) The "facilities subject to the jurisdiction" of the FPC to which § 7 (b) applies are those required for the interstate transportation of natural gas and for the interstate sale of gas for resale to the ultimate consumer. P. 87.

(b) "Abandonment" of facilities does not require their physical alteration but can be accomplished, as here, by allowing them to become operationally dormant for an indefinite time. Pp. 87–88.

(c) "Service" includes the taking and transportation of gas from a particular field as well as its sale. Pp. 88–89.

(d) The FPC has power to regulate the purchase of gas where necessary to the exercise of its authority over the transportation and sale thereof. Pp. 89–90.

(e) Though United must reactivate its Johnson Bayou facilities and restore service, it may ask the FPC to permit abandonment upon a proper showing of justification therefor. P. 91.

350 F. 2d 689, affirmed.

Vernon W. Woods argued the cause and filed briefs for petitioner.

Peter H. Schiff argued the cause for respondent Federal Power Commission. With him on the brief were *Solicitor General Marshall, Ralph S. Spritzer, Richard A. Posner, Richard A. Solomon* and *Howard E. Wahrenbrock.*

Bruce R. Merrill argued the cause and filed a brief for respondent Continental Oil Co.

MR. JUSTICE WHITE delivered the opinion of the Court.

United Gas Pipe Line Company and Continental Oil Company executed a contract effective January 31, 1953, providing for the sale by Continental and the purchase by United of gas produced from the Johnson Bayou Field in the State of Louisiana, at prices stated in the contract. The contract was to run for 10 years and from year to year thereafter unless terminated by either party on 90 days' notice. To effectuate delivery to United's nearby Mud Lake transmission line for transportation of the gas into the Beaumont, Texas, area, Continental constructed several thousand feet of pipeline, separators and storage tanks. United, for its part, constructed a

short length of pipeline, a separator, a meter station and valves. United sought, was granted and accepted a certificate of public convenience and necessity authorizing the continued transportation of gas from the Johnson Bayou Field and the construction and operation of the facilities necessary therefor. 14 F. P. C. 582. Likewise, Continental was issued a certificate authorizing the sale of gas to United under the terms of the contract. 15 F. P. C. 1650.

In October 1962 Continental elected to terminate the contract at the end of the primary term. Negotiations for a new contract were fruitless. Continental, after refusing United's offer to continue purchasing on a day-to-day basis at the old contract rate, filed a rate increase with the Commission asking for an effective date of January 31, 1963. The Commission accepted the filing over United's protest.[1] United, after advance notice to Continental, then ceased purchasing gas from the Johnson Bayou Field on January 31, 1963, and has since refused to purchase gas from that source. Following a petition by Continental, an order to show cause issued by the Commission to United and a full hearing, the Commission found that United, by ceasing to take gas from the Johnson Bayou Field, had abandoned its facilities used for this purpose as well as the service rendered by these facilities, contrary to the provisions of § 7 (b) of the Natural Gas Act which forbid such abandonment without the consent of the Commission being first obtained.[2] Accordingly, the Commission ordered United

[1] United unsuccessfully petitioned for rehearing of the Commission's order approving the rate increase, 29 F. P. C. 525, but did not seek judicial review of the order.

[2] Section 7 (b) of the Act provides that "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Com-

to "renew operation of its Johnson Bayou Field facilities used to purchase gas from Continental" and directed that the purchases by United were to be at Continental's new rate and in volumes consistent with the terms of the contract previously in force. 31 F. P. C. 1079, 1086. The Court of Appeals upheld the Commission's order, 350 F. 2d 689, and we granted certiorari, 383 U. S. 924, because the case involved an important question concerning the Commission's jurisdiction under the Natural Gas Act. We affirm.

We agree with the Commission and the Court of Appeals that United's refusal to continue receiving gas from the Johnson Bayou Field constituted an abandonment of "facilities" and a "service" to which § 7 (b) applies. That section places conditions on the abandonment of facilities or of any service rendered thereby. The facilities covered by the section are those "subject to the jurisdiction of the Commission," the further identification of which requires resort to other sections of the Act. Section 1 (b)[3] declares that the provisions of the Act are to apply to: (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale for ultimate public consumption and (3) natural gas companies engaged

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mission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

[3] The text of the section provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b).

in such transportation or sale. Under § 7 (c)[4] no natural gas company is permitted to engage in the transportation or sale of natural gas, or to undertake the construction or extension of facilities therefor without a certificate of public convenience and necessity authorizing such acts or operations. Thus the "facilities subject to the jurisdiction of the Commission" which are reached by the abandonment provisions of § 7 (b) are those facilities required for the interstate transportation of natural gas and for the interstate sale of gas for resale to the ultimate consumer. Conversely, it would seem beyond argument that the proscription of abandoning "any service" rendered by those facilities would include both transportation and sale, the twin functions which subject the facilities to the provisions of the Act.

We are convinced that United's Johnson Bayou Field facilities were subject to the jurisdiction of the Commission. They were constructed solely for the purpose of the taking and interstate transportation of Johnson Bayou gas. They could not, therefore, be abandoned without the consent of the Commission and we do not understand United's position in this Court to be otherwise. United, however, insists that there has not in fact been a § 7 (b) "abandonment." It is true that the Johnson Bayou Field facilities were neither removed nor disconnected. Their use could have been resumed at

[4] The text of the section, in relevant part, provides that "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ." Added by the Act of February 7, 1942, 56 Stat. 83, 15 U. S. C. § 717f (c).

any time had United so desired. But the physical alteration of facilities is not a *sine qua non* restricting the Commission's jurisdiction under § 7 (b). Here United ceased taking and transporting gas from the Johnson Bayou Field on January 31, 1963, has not taken that gas or used its facilities constructed for that purpose since that time and has no intention of doing so as long as Continental's present rates continue in effect. United, the Commission found, had by its own action rendered its facilities "operationally dormant for a period of indefinite duration." 31 F. P. C. 1079, 1083. In addition, the Commission found that its interest went beyond the physical alteration of facilities. "We have a regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market so long as the public interest demands . . . ." 31 F. P. C. 1079, 1082. As the instant proceeding unmistakably revealed, the responsibility of the Commission could not adequately be met if it were powerless to assure that facilities "certificated to transport this gas," *ibid.*, continued to operate. To hold United's conduct an abandonment within the meaning of § 7 (b) is a reasonable interpretation of the Act and we shall not disturb it.

The corollary conclusion, inescapably presented on the face of the Act itself, is that the consent of the Commission is necessary before United can cease taking and transporting Johnson Bayou gas, since this is a service United rendered through the facilities it constructed for that very purpose. United, however, contends that the words "any service" in § 7 (b) include only the sale of natural gas, not the taking and transportation of gas from any particular field. In its view it is free at any time to abandon the interstate transportation of gas from the Johnson Bayou Field, and to decide for itself wholly apart from the Commission what gas it will continue to transport interstate. But nothing in the Act, its

legislative history or in our cases has been called to our attention which persuasively supports this narrow view or which would justify recognizing the sale of gas as a service but not the preceding transportation without which there would be no sale at all.

The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale. *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464; *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 359 F. 2d 675. Here, of course, the transportation is not for hire but for sale, some for consumption and some for resale. What is more, in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 149–150, the Court clearly recognized that the term "service" is not confined to sales but extends to the "movement of gas in interstate commerce" and that one who engages in *either* the sale or the transportation of gas is performing a service within the meaning of both §§ 7 (e) and 7 (b). It could not be more clear that United here abandoned a "service," the taking of Johnson Bayou Field gas and its transportation in interstate commerce. The statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped.

Even so, United argues that the Act gives the Commission no authority over the purchase of natural gas, and that the Commission therefore exceeded its jurisdiction in ordering United to continue purchasing gas from Continental in amounts specified in an expired contract and at prices set unilaterally by Continental. It is true that the Act does not in so many words grant the same express authority over purchases to the Commission that it does over sales. Neither is there a blanket exemption of Commission jurisdiction over the purchase of

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gas, and there is express authority over transportation as well as sale. Under § 16, the Commission has the power "to perform any and all acts, and to . . . issue . . . such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 52 Stat. 830, 15 U. S. C. § 717*o*. Where it is necessary to regulate the purchase of gas in some respects to carry out its expressly granted authority over transportation and sale, the Commission must have the power to do so. In the case before us, there has been a § 7 (b) abandonment of facilities or services without Commission consent. It is therefore quite proper for the Commission to order the facilities reactivated and the abandoned service restored, even though the resumption by United of the transportation of gas from the Johnson Bayou Field will entail the purchase of gas from Continental at the legally established price. Undoubtedly, the continued purchase of gas has been ordered but only as an incident to regulating transportation or sale. This is no more than the Act authorizes and no more than United undertook to do when it sought and received certification for the service it sought to perform.[5]

After United had begun to purchase gas from the Johnson Bayou Field in 1953 and to transport it to markets in the State of Texas, United sought a certificate of public convenience and necessity authorizing the construction and use of the facilities it had built and the continued transportation of the Johnson Bayou gas. United then asserted that the public convenience and necessity required the issuance of such a certificate.[6]

[5] What we have said, of course, does not imply that the Commission has the power to compel initial purchases of gas. We reach only the question of the Commission's power under § 7 (b) to order reactivation of abandoned facilities and service.

[6] United's application for the certificate, docketed September 20, 1954, appears in FPC Docket No. G–2818, United Gas Pipe Line Company.

Both the construction and operation of the facilities and the *transportation* of gas by means thereof were found by the Commission to be required by the public convenience and necessity. United was found "able and willing . . . to perform the *service* . . ." for which it had volunteered.[7] A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform—the continued transportation of Johnson Bayou gas—without a § 7 (b) finding by the Commission "that the present or future public convenience or necessity permit[s] such abandonment." This is precisely what the Act forbids.

United claims that it does not need the Johnson Bayou gas to serve its customers and that the forced purchase of gas at prices set by Continental and approved by the Commission without regard to the prices at which United under contract or competition is bound to sell the gas deprives it of property without due process of law. In our view, these claims are premature. We do not hold that it would be inappropriate for the Commission to permit abandonment in this case if it is asked to do so and the necessary findings are made. We hold only that United has abandoned facilities and service without the consent of the Commission and that it must reactivate those facilities and restore the service until and unless the statutory consent is obtained. If United now resorts to the Commission, it will have every opportunity to present its economic and constitutional grounds for abandonment.

For the reasons herein stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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[7] The Commission's complete order appears in Docket G–2818, *supra*, n. 6; an abbreviated version appears in 14 F. P. C. 582. (Emphasis added.)

O'CONNOR *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 477. Decided November 14, 1966.

Petitioner's failure at trial and during his first appeal in the state courts to object to prosecutor's comment on his not testifying in criminal trial which resulted in his conviction, review of which was being sought in this Court when *Griffin* v. *California,* 380 U. S. 609, was decided, *held* not to foreclose petitioner's right to attack as unconstitutional the practice of making such comment following its invalidation in *Griffin.*

Certiorari granted; 6 Ohio St. 2d 169, 217 N. E. 2d 685, reversed.

James W. Cowell for petitioner.

Harry Friberg for respondent.

PER CURIAM.

This is the second time petitioner has come before this Court with the claim that the prosecutor's comment upon his failure to testify during his trial for larceny violated the constitutional right to remain silent. In *O'Connor* v. *Ohio,* 382 U. S. 286, we considered this contention when we granted certiorari, vacated the conviction and remanded the case to the Supreme Court of Ohio for further proceedings in light of our decision in *Griffin* v. *California,* 380 U. S. 609. Following remand, the Ohio court by a closely divided vote upheld petitioner's conviction solely on the ground that he failed to object to the proscribed comment at his trial and during his first appeal in the state courts. That failure was held to preclude the Ohio appellate courts from considering the claim that petitioner's federal constitutional rights had been infringed.

The State does not contest the fact that the prosecutor's remarks violated the constitutional rule announced

in *Griffin*. Moreover, it is clear the prospective application of that rule, announced in *Tehan* v. *Shott*, 382 U. S. 406, does not prevent petitioner from relying on *Griffin*, since his conviction was not final when the decision in *Griffin* was rendered. Indeed, in *Tehan* we cited our remand of petitioner's case as evidence that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* judgment. 382 U. S., at 409, n. 3. Thus, the only issue now before us is the permissibility of invoking the Ohio procedural rule to defeat petitioner's meritorious federal claim.

We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. Recognition of the States' reliance on former decisions of this Court which *Griffin* overruled was one of the principal grounds for the prospective application of the rule of that case. See *Tehan* v. *Shott*, 382 U. S. 406, 417. Defendants can no more be charged with anticipating the *Griffin* decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when *Griffin* was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court.

We therefore grant the petition for certiorari and reverse the judgment of the Supreme Court of Ohio.

It is so ordered.

UNITED STATES ET AL. *v.* SASKATCHEWAN MINERALS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 525. Decided November 14, 1966.*

District Court's order setting aside on the merits ICC's dismissal of appellee's complaint that railroad rates were preferential and ordering ICC to grant appellee relief *held* unduly limited ICC's duty to reconsider the entire case.

253 F. Supp. 504, vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane, Fritz R. Kahn and *Betty Jo Christian* for the United States et al. in No. 525.

Charles W. Burkett, W. Harney Wilson, Arthur A. Arsham and *Willard P. Scott* for appellants in No. 526.

Wayne W. Wright for appellee in both cases.

PER CURIAM.

These appeals are from an amended judgment of a three-judge district court, 253 F. Supp. 504, which set aside an order of the Interstate Commerce Commission dismissing appellee's complaint, 325 I. C. C. 621, and remanded the case to the Commission "for further proceedings with instructions to grant relief" to the appellee "in accordance with the opinion heretofore entered by this court on December 8, 1965, and the Supplemental Memorandum Decision entered by this Court on March 3, 1966." Accepting the District Court's decision to set aside the Commission's order on the merits, appellants challenge that portion of the judgment which instructs

*Together with No. 526, *Great Northern Railway Co. et al.* v. *Saskatchewan Minerals*, also on appeal from the same court.

the Commission to grant relief to the appellee and precludes the Commission from reopening the proceedings for the receipt of additional evidence relevant to the question whether the rates challenged by the appellee are in fact unreasonably preferential in violation of § 3 (1) of the Interstate Commerce Act, 49 U. S. C. § 3 (1). We agree with the appellants that, under the circumstances present here, this restriction is an improper limitation on the Commission's duty to reconsider the entire case. *Arrow Transp. Co.* v. *Cincinnati, N. O. & T. P. R. Co.*, 379 U. S. 642. Accordingly, the judgment of the District Court is vacated and the cases are remanded to the District Court with instructions to enter an order remanding the case to the Commission for further proceedings consistent with the District Court's opinion of December 8, 1965.

It is so ordered.

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL, DISTRICT NO. 2, ET AL. *v.* HASKELL COUNTY PLANNING BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 560. Decided November 14, 1966.

197 Kan. 321, 416 P. 2d 791, appeal dismissed.

Dale M. Stucky for appellants.

Robert C. Londerholm, Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LITTLE *v.* RHAY, PENITENTIARY SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 669, Misc. Decided November 14, 1966.

68 Wash. 2d 353, 413 P. 2d 15, appeal dismissed and certiorari denied.

Francis Conklin for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied.

BOARD OF PUBLIC WORKS OF MARYLAND ET AL. *v.* HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 473. Decided November 14, 1966.*

242 Md. 645, 220 A. 2d 51, certiorari denied in No. 473; appeal dismissed in No. 590.

Thomas B. Finan, former Attorney General of Maryland, for the Board of Public Works of Maryland, and *William L. Marbury* for Saint Joseph College et al., petitioners in No. 473.

Leo Pfeffer for appellants in No. 590.

Robert C. Murphy, Attorney General of Maryland, and *Edward L. Blanton, Jr.,* Assistant Attorney General, for the Board of Public Works of Maryland, and *Parsons Newman* for Hood College, appellees in No. 590.

John Holt Myers for the Association of American Colleges, as *amicus curiae,* in support of the petition in No. 473.

PER CURIAM.

The petition for a writ of certiorari in No. 473 is denied. The motion to dismiss in No. 590 is granted and the appeal is dismissed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that in No. 473 certiorari should be granted and the case set for plenary consideration, and that in No. 590 probable jurisdiction should be noted and the case set down for oral argument.

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*Together with No. 590, *Horace Mann League of the United States of America, Inc., et al.* v. *Board of Public Works of Maryland et al.,* on appeal from the same court.

HALL *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 672, Misc. Decided November 14, 1966.

187 So. 2d 861, appeal dismissed.

PER CURIAM.

The appeal is dismissed.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that the appeal should be dismissed for want of jurisdiction.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that probable jurisdiction should be noted.

Syllabus.

BANK OF MARIN *v.* ENGLAND, TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 63. Argued October 20, 1966.—Decided November 21, 1966.

Petitioner, a bank, honored checks drawn before, but presented for payment after, the depositor had filed a voluntary bankruptcy petition, the bank being unaware of the bankruptcy proceeding. On the trustee's application for a turnover order, the referee held the bank and the payee jointly liable to the trustee for the amount of the checks. The payee fully paid the joint judgment and served demand upon the bank for contribution. From the District Court's affirmance of the referee's order only the bank appealed. The Court of Appeals affirmed, holding that regardless of whether the bank knew of the bankruptcy the bankrupt's checking account became frozen when the bankruptcy petition was filed by virtue of § 70a of the Bankruptcy Act, which "by operation of law" as of the date of the filing of the petition vests the trustee with the bankrupt's title to described kinds of property "including rights of action." *Held:*

1. The payee's payment of the joint judgment does not moot the case since the payee can still sue the petitioner for contribution. Pp. 100–101.

2. Absent revocation of its authority or knowledge of the bankruptcy, a bank cannot be held liable for honoring checks drawn before a depositor filed a voluntary bankruptcy petition. Pp. 101–103.

(a) The bank is the depositor's debtor and, unless there has been revocation giving the bank notice, must honor checks drawn upon it. P. 101.

(b) The act of filing a voluntary bankruptcy petition does not *per se* constitute notice to the bank. P. 102.

(c) It would be inequitable to hold the bank liable for an invalid transfer under §§ 70d (5) and 18f of the Act when the force of those provisions can be maintained by imposing liability on the payee of the checks, the creditor of the bankrupt which benefited from the transaction. Pp. 102–103.

352 F. 2d 186, reversed.

Edgar B. Washburn argued the cause for petitioner. With him on the briefs were *Carlos R. Freitas* and *Bryan R. McCarthy.*

Thomas B. Donovan argued the cause for respondent. With him on the brief was *John Walton Dinkelspiel.*

John P. Austin filed a brief for the California Bankers Association, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented by this case is whether a bank which honored checks of a depositor drawn before its bankruptcy but presented for payment after it had filed a voluntary petition in bankruptcy, is liable to the trustee for the amount of the checks paid where the bank had no knowledge or notice of the proceeding. The trustee applied to the referee for a turnover order requiring petitioner bank to pay to the trustee the amount of the checks and in the alternative asking the same relief against the payee. The referee determined that petitioner and the payee were jointly liable to the trustee. The District Court affirmed. Only petitioner appealed and the Court of Appeals affirmed the District Court. 352 F. 2d 186. We granted certiorari because of the importance of the question presented. Cf. *Rosenthal* v. *Guaranty Bank & Trust Co.,* 139 F. Supp. 730; *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306.

I.

We were advised on oral argument that the joint judgment rendered against petitioner, the bank, and the payee of the checks was paid in full by the payee and that at present respondent's sole financial interest in this litigation is protection against imposition of costs under our Rule 57. It is therefore suggested that the case is moot.

We do not agree. Whatever might be the result if costs alone were involved (cf. *Heitmuller* v. *Stokes*, 256 U. S. 359, 362) this case should not be dismissed. We are advised that the payee has paid the joint judgment and has filed with the bankruptcy court and served on petitioner a demand for contribution from it respecting sums paid in satisfaction of the judgment. Thus petitioner is still subject to a suit because of the original judgment as to its liability. We would, therefore, strain the concepts of mootness if we required petitioner to start all over again when the payee sues it for contribution.

II.

Section 70a of the Bankruptcy Act, 52 Stat. 879, 11 U. S. C. § 110 (a), provides that a trustee in bankruptcy is vested "by operation of law" with the title of the bankrupt as of the date of the filing of the petition to described kinds of property "including rights of action." § 70a (5). But we do not agree with the Court of Appeals that the bankrupt's checking accounts are instantly frozen in the absence of knowledge or notice of the bankruptcy on the part of the drawee. The trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition. See *Zartman* v. *First National Bank*, 216 U. S. 134, 138. The relationship of bank and depositor is that of debtor and creditor, founded upon contract. The bank has the right and duty under that contract to honor checks of its depositor properly drawn and presented (*Allen* v. *Bank of America*, 58 Cal. App. 2d 124, 127, 136 P. 2d 345, 347; *Weaver* v. *Bank of America*, 59 Cal. 2d 428, 431, 380 P. 2d 644, 647; and see *Anderson National Bank* v. *Luckett*, 321 U. S. 233), absent a revocation that gives the bank notice prior to the time the checks are accepted or paid by the bank.

See *Hiroshima* v. *Bank of Italy*, 78 Cal. App. 362, 369, 248 P. 947, 950. The Court of Appeals held that the bankruptcy of a drawer operates without more as a revocation of the drawee's authority. 352 F. 2d, at 191. But that doctrine is a harsh one that runs against the grain of our decisions requiring notice before a person is deprived of property (*Mullane* v. *Central Hanover Bank & Trust Co., supra*, at 314–318; *Walker* v. *City of Hutchinson*, 352 U. S. 112; *Schroeder* v. *City of New York*, 371 U. S. 208), a principle that has been recognized and applied in proceedings under the Bankruptcy Act. *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 296–297. The kind of notice required is one "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action." *Mullane* v. *Central Hanover Bank & Trust Co., supra*, at 314. We cannot say that the act of filing a voluntary petition in bankruptcy *per se* is reasonably calculated to put the bank on notice. Absent revocation by the drawer or his trustee or absent knowledge or notice of the bankruptcy by the bank, the contract between the bank and the drawer remains unaffected by the bankruptcy and the right and duty of the bank to pay duly presented checks remain as before. In such circumstances the trustee acquires no rights in the checking account greater than the bankrupt himself.

Section 70d (5), 52 Stat. 882, 11 U. S. C. § 110 (d)(5), provides, with exceptions not relevant here, that "no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee." And in case of a voluntary petition (with exceptions not material here) the filing operates as an adjudication. § 18f, 73 Stat. 109, 11 U. S. C. § 41 (f). It is therefore argued with force that payment by the drawee of a drawer bankrupt's checks after the date of that filing is a "transfer" within the meaning of § 70d (5).

Yet we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. Section 2a, 52 Stat. 842, 11 U. S. C. § 11 (a); *Pepper* v. *Litton*, 308 U. S. 295, 304–305; *Securities & Exchange Commission* v. *U. S. Realty & Imp. Co.*, 310 U. S. 434, 455. We have said enough to indicate why it would be inequitable to hold liable a drawee who pays checks of the bankrupt duly drawn but presented after bankruptcy, where no actual revocation of its authority has been made and it has no notice or knowledge of the bankruptcy. The force of §§ 70d (5) and 18f can be maintained by imposing liability on the payee of the checks where he has received a voidable preference or other voidable transfer. The payee is a creditor of the bankrupt, and to make him reimburse the trustee is only to deprive him of preferential treatment and to restore him to the category of a general creditor. To permit the trustee under these circumstances to obtain recovery only against the party that benefited from the transaction is to do equity.

Reversed.

MR. JUSTICE HARLAN, dissenting.

The Court, in its haste to alleviate an indisputable inequity to the bank, disregards, in my opinion, both the proper principles of statutory construction and the most permanent interests of bankruptcy administration. I must dissent.[1]

The Act itself is unambiguous. Section 70a vests title to the bankrupt's property in the trustee "as of the date of the filing of the petition." 52 Stat. 879, 11

[1] Like the Court, I believe that this case is not moot. In addition to what has been said by the majority, compare *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, and *Aeronautical Industrial Dist. Lodge* v. *Campbell*, 337 U. S. 521.

U. S. C. § 110 (a). Section 70d nonetheless sustains bona fide transfers of the property made after filing and "before adjudication or before a receiver takes possession . . . whichever first occurs. . . ." 52 Stat. 881, 11 U. S. C. § 110 (d). Transactions excluded from the shelter of § 70d are, so far as pertinent, within § 70d (5), which provides that "no [such] transfer by or in behalf of the bankrupt . . . shall be valid against the trustee . . . ." 52 Stat. 882, 11 U. S. C. § 110 (d)(5). The adjudication of voluntary petitions results by operation of law from filing. § 18f, 73 Stat. 109, 11 U. S. C. § 41 (f).

In the situation before us, the remaining issue is accordingly whether this transfer occurred before or after September 26, the day on which Seafoods filed its petition in bankruptcy and was perforce adjudicated bankrupt. I do not understand petitioner to contend, or the Court to suggest that this occurred at a time other than presentment of the checks, October 2. Given the law of California, by which a check is not a *pro tanto* transfer of the drawer's rights until presentment, I cannot see that another moment is possible. California Civil Code § 3265e; California Commercial Code § 3409. In sum, I find it unavoidable that the Act's plain words hold the bank liable to the trustee for the value of its payment on Seafoods' behalf.[2]

I do not suggest that this Court should confine its attention to the unadorned terms of the Bankruptcy

[2] It is true that the negotiability proviso to § 70d (5) has once been held to protect a bank in analogous circumstances. *Rosenthal* v. *Guaranty Bank & Trust Co.*, 139 F. Supp. 730. The proviso's legislative history throws little light on its intended scope. It appears inapplicable here. First, presentment is not strictly a negotiation. Second and more important, other constructions are more consonant with the balance of § 70d. Cf. 70 Harv. L. Rev. 548, 550. 4 Collier, Bankruptcy ¶ 70.68, at 1502, n. 3 (14th ed. 1964). I do not understand the Court to rely upon the proviso.

Act. Nonetheless, where Congress has pointed so unmistakably in one direction, prudence and simple propriety surely require that we examine carefully the impulses which beckon us to another. The Court explains its resolution of this case by two apparently alternative contentions. I am unpersuaded that either permits us to circumvent the Act's demands.

The Court first intimates, without expressly deciding, that the bank is shielded by its contractual right to a seasonable revocation of its duty to honor checks drawn upon it. The Court vouches for this the doctrine that a trustee in bankruptcy takes rights no wider or more complete than his bankrupt had. It is doubtless true that a trustee is not a bona fide purchaser or encumbrancer, and that he ordinarily assumes the bankrupt's property subject to existing claims, liens, and equities. *Hewit* v. *Berlin Machine Works,* 194 U. S. 296. Unfortunately, these maxims scarcely suffice to decide this case. They are interstitial rules, valid no further than the Act's positive requirements permit. *First National Bank* v. *Staake,* 202 U. S. 141. 4 Collier, Bankruptcy ¶ 70.04, at 954.2. The Act in several respects clothes the trustee in powers denied to his bankrupt: A trustee may thus avoid, although his bankrupt may not, transactions deemed fraudulent under the Act, liens obtained and preferential transfers completed within four months of bankruptcy, and statutory liens within the prohibition of § 67c (2). 4 Collier, Bankruptcy ¶ 70.04, at 957.

The Court does not assert that this transfer is protected by § 70d. I understand it instead to concede that, equitable considerations aside, the bank's payment is invalid against the trustee. I must conclude that the Court has reasoned that a contractual defense retained against the bankrupt suffices to preclude use of a power expressly conferred upon the trustee. If this is the Court's meaning, it has traversed both logic and author-

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ity, and has emasculated the powers given to trustees under the Act.

The Court's principal contention seems to be that equitable considerations oblige it to release the bank from liability. Its premise plainly is that equity is here a solvent to which we may appropriately resort; I am unable to accept that premise. This is not a case in which the statute is imprecise. Nor is it a case in which the legislature's intentions have been misshapen by the statute's words; even a cursory examination of the history of § 70 will evidence that its terms faithfully reflect Congress' purposes.

The Act of 1898 vested title to the bankrupt's property in the trustee at adjudication, but contained nothing to prevent its dissipation in the interval after filing.[3] The courts were therefore left free to devise protective rules to reconcile the competing interests of the estate and of those who dealt with the bankrupt in this period. The fulcrum of those rules was the proposition that a "petition [in bankruptcy] is a *caveat* to all the world, and in effect an attachment and injunction." *Mueller* v. *Nugent*, 184 U. S. 1, 14. The courts softened its severity by a series of exceptions, either employing or distinguishing it as equity or convenience suggested. The result, as a principal draftsman of the Chandler Act reforms described it, was that "no consistent theory of protected transactions has been developed," and the situation was "conducive to confusion and uncertainty, with potentialities for argument, 'bluffing,' litigation, expense and de-

[3] This Court had held that despite the cleavage at adjudication, the trustee took the title as it was at filing. *Everett* v. *Judson*, 228 U. S. 474. The situation is summarized in McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 U. Chi. L. Rev. 369, 383.

lay." [4] The law consisted essentially of "nebulous vagaries." [5]

The Chandler Act stemmed chiefly from a sustained investigation of these and other problems by the National Bankruptcy Conference.[6] Its members were the Act's principal draftsmen. The revisions they made to § 70 entirely restructured the basis both of the trustee's title and of the protection given to transactions which occur after filing. Their purpose, as one of them explained to the Chandler subcommittee, was to provide "a clear statutory basis" to the issues of title and protected transactions, in "lieu of a crazy quilt of contradictory judicial statements." [7] The effect of their revisions was to define "the full extent to which bona fide transactions with the bankrupt, *after* bankruptcy, will be protected." [8]

Adjudication and receivership were plainly expected to mark the perimeters of this protection. Various factors determined this choice. First, none of the several exceptions to *Mueller* v. *Nugent* reached transactions

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[4] McLaughlin, Amendment of the Bankruptcy Act (pts. 1 & 2), 40 Harv. L. Rev. 341, 583, at 615. The same conclusions are reached by Weinstein, The Bankruptcy Law of 1938, at 161.

[5] 4 Collier, Bankruptcy ¶ 70.66, at 1495.

[6] A brief history of the Conference's work may be found in McLaughlin, 4 U. Chi. L. Rev., at 375.

[7] Hearing before the House Committee on the Judiciary on H. R. 6439, 75th Cong., 1st Sess., 212. Professor McLaughlin quoted from his article in 40 Harv. L. Rev. 341. He subsequently acknowledged that § 70 would permit an area in which the courts could continue to balance the competing interests of the parties. *Ibid.* In light of the importance attached to adjudication as a line of cleavage, and the comparative insignificance intended for § 70d in voluntary proceedings, see *infra,* I do not believe that this acknowledgment can be taken to reach this case.

[8] 4 Collier, Bankruptcy ¶ 70.67, at 1500.

which occurred after adjudication.[9] More important, once the draftsmen had elected to vest title in the trustee from filing, they were chiefly anxious to shield debtors from the consequences of unwarranted involuntary petitions.[10] They feared that such a petition might ruin a debtor by inducing others to avoid dealings with him. Section 70d was expected to immunize bona fide transactions after filing, and thus to encourage dealings with the solvent debtor. There is no need for such protection after adjudication. Finally, adjudication and receivership signal the beginning of bankruptcy administration, and they are therefore both appropriate moments at which to forbid all further meddling with the estate.[11]

It is equally plain that the protection offered by § 70d must have been intended principally for involuntary proceedings. There are several indications of this. Most important, the hazard to which the section was chiefly directed, the consequences of an unwarranted petition upon a debtor's credit, is entirely absent from voluntary proceedings. Thus, the discussion of this problem before the Chandler subcommittee was explic-

[9] 4 Collier, Bankruptcy ¶ 70.66, at 1498. In the one apparent exception, *Jones* v. *Springer*, 226 U. S. 148, a dredge had been placed in the hands of a receiver under an attachment levied before filing. The Court concluded that this sufficed to avoid the ordinary limitations imposed by adjudication.

[10] Hearing before the House Committee on the Judiciary on H. R. 6439, 75th Cong., 1st Sess., 211. Professor McLaughlin described this to the subcommittee as "the next most pressing problem." He concluded that "[w]e have put in a provision [70d] to cover that [the problem of unwarranted petitions]." His explanation to the subcommittee of § 70d was based entirely on this problem. There is of course evidence that the draftsmen also expected to alleviate unfairness which § 70a might otherwise produce. See Analysis of H. R. 12889, House Committee on the Judiciary, 74th Cong., 2d Sess., 230 (Comm. Print 1936).

[11] MacLachlan, Handbook of the Law of Bankruptcy 346.

itly confined to involuntary petitions.[12] Further, the protection offered by § 63b, which closely supplements § 70d, extends only to involuntary proceedings.[13] Finally, the draftsmen must surely have known that the adjudication of voluntary petitions ordinarily followed quickly and routinely after filing.[14] It was certainly not unknown for adjudication to occur on the day of filing.[15] The draftsmen could only have intended that any protection given in voluntary proceedings by § 70d be fleeting and minimal.[16]

In short, § 70 was tailored to provide carefully measured protection to bona fide transfers. It was intended to preclude further confusion and uncertainty. There is every indication that its terms faithfully reflect its purposes.

I fully sympathize with the discomfort of the bank's position, but I cannot escape the impact of what

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[12] Hearing before the House Committee on the Judiciary on H. R. 6439, 75th Cong., 1st Sess., 211.

[13] 52 Stat. 873, 11 U. S. C. § 103 (b). Section 63b provides that "In the interval after the filing of an involuntary petition and before the appointment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services."

[14] MacLachlan, Handbook of the Law of Bankruptcy 40.

[15] See, *e. g.*, *New York County National Bank* v. *Massey*, 192 U. S. 138.

[16] Further, the 1959 amendments to § 18, by which adjudication results by operation of law from filing, were adopted upon the recommendation of the Judicial Conference and its Committee on Bankruptcy Administration. Annual Report of the Proceedings of the Judicial Conference, 1958, p. 28. The bill received the endorsement of the National Bankruptcy Conference. H. R. Rep. No. 241, 86th Cong., 1st Sess., 2. It therefore seems quite improbable that the 1959 amendments could have inadvertently excluded voluntary proceedings from the scope of § 70d.

Congress has done.[17] The Court has not found § 70 constitutionally impermissible.[18] It has simply measured the statute by the standard of its own conscience, and concluded that equity requires a result which the statute forbids. I had thought it well settled that equity may supplement, but may never supersede, the Act. 1 Collier, Bankruptcy ¶ 2.09, at 171–172. The Act's language is neither imprecise nor infelicitous; I can therefore see no room for the interposition of equity.

More important, the Court today permits the dilution of the Chandler amendments to § 70. The Court's disposition of this case may be taken to suggest that whenever equity is thought strongly to demand relief from the strictures of the Act, further exceptions may be appropriately created to the statutory scheme. I fear that the Court may have set in motion once more the protracted process which before 1938 resulted in "confusion and uncertainty," "litigation, expense and delay."

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[17] Judge Soper's reasoning in *Lake* v. *New York Life Insurance Co.*, 218 F. 2d 394, 399, seems entirely persuasive: "Whether the line which has been drawn is the best possible solution of the problem is not for the courts to say. The line has in fact been drawn by competent authority and it is no longer necessary for the courts to make the attempt, which has not been conspicuously successful in the past, to decide cases on the facts as they arise . . . ." See also *Kohn* v. *Myers*, 266 F. 2d 353.

[18] I cannot in any event accept petitioner's contention that these provisions have denied it due process. In exercise of its express constitutional authority over bankruptcy, Art. I, § 8, Congress has attached great importance to swift and efficient administration; to this purpose it devised a statutory scheme by which it balanced the competing rights of the interested parties. Congress' purposes are permissible, and the scheme it has adopted is reasonably calculated to achieve those purposes. In this context I cannot say that the Constitution requires that all whose rights may be reached by bankruptcy proceedings must first have actual notice of them. Cf. *Hanover National Bank* v. *Moyses*, 186 U. S. 181.

If so, the Chandler amendments will have had no more permanent result than to wipe the judicial slate momentarily clean.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE FORTAS.

I would vacate the judgment. I believe that we do not have before us a case or controversy between the parties of record.

Respondent, the trustee in bankruptcy, has no substantial stake in the outcome of this litigation and is not an adversary in the usual sense. On February 24, 1964, the referee in bankruptcy ruled that both the petitioner bank and the payee on the bankrupt's checks were liable to the trustee. On May 19, 1964, the payee paid the trustee in full and has not been a party to this litigation since that time. Having received full payment, the trustee has no interest in the litigation except professional curiosity as to the question of law—and he so apprised the District Court, the Court of Appeals, and this Court. See Brief for Respondent, p. 2. See also Petition for Certiorari, p. 4. Nevertheless, the bank, also eager for an answer to this intriguing legal problem and facing a claim from the payee for contribution, continued the litigation against the trustee, and the trustee obligingly went along. The respondent trustee's only financial interest is admittedly confined to the question of court costs,[1] incurred as a volunteer.

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[1] An unbroken line of cases establishes the rule that controversy as to costs alone does not salvage an otherwise moot case. See, *e. g.*, *Walling* v. *Reuter Co.*, 321 U. S. 671, 677 (1944); *United States* v. *Anchor Coal Co.*, 279 U. S. 812 (1929); *Alejandrino* v. *Quezon*, 271 U. S. 528, 533–536 (1926); *Brownlow* v. *Schwartz*, 261 U. S. 216 (1923); *Heitmuller* v. *Stokes*, 256 U. S. 359, 362–363 (1921); Robertson & Kirkham, Jurisdiction of the Supreme Court

There are two reasons of substance why the Court should not, in this case, decide the important statutory question presented. First, this is not an adversary proceeding, and has not been one since respondent received full payment in 1964. It is basic to our adversary system to insist that the courts have the benefit of the contentions of opposing parties who have a material, and not merely an abstract, interest in the conflict. Adverse parties—adverse in reality and not merely in positions taken—are absolutely necessary. See, *e. g.*, *Muskrat* v. *United States*, 219 U. S. 346, 361–363 (1911); *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 313–314 (1893); *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301–302 (1892). Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–242 (1937) (Hughes, C. J.); *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922) (Brandeis, J.).

Second, this is a peculiar case in which to depart from the settled rule. The effect of the decision today is to strip the payee of its asserted right to contribution, although the payee is not before this Court, and was not before the Court of Appeals or the District Court. The question of the relative rights and obligations of the payee and the bank ought to be resolved in litigation in which both participate.[2] Cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The impact of today's decision upon a party not present confirms the wisdom of the rule "that when there is no actual controversy, involving real and substantial rights, between

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of the United States § 274 (Wolfson & Kurland ed.); 6 Moore, Federal Practice ¶ 54.70 [5], at 1311 (2d ed. 1965).

[2] Upon vacation of the judgment below, the bank would be free to relitigate with the payee the question of its own liability, since the bank was in no respect responsible for the manner in which this case became a nonadversary proceeding. See *United States* v. *Munsingwear*, 340 U. S. 36, 39–40 & n. 1 (1950).

the parties to the record, the case will be dismissed." *Little* v. *Bowers*, 134 U. S. 547, 557. See also *Lord* v. *Veazie*, 8 How. 251, 255.

I would vacate the judgment below and remand with direction to dismiss. See *Mechling Barge Lines* v. *United States*, 368 U. S. 324, 329–330 (1961); *United States* v. *Munsingwear*, 340 U. S. 36, 39–41 (1950).

BADGLEY ET AL. *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 505. Decided November 21, 1966.

376 Mich. 410, 137 N. W. 2d 495, 138 N. W. 2d 16; 377 Mich. 396, 140 N. W. 2d 436, appeal dismissed.

William T. Gossett for appellants.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Curtis G. Beck*, Assistant Attorney General, for Hare; *Theodore Sachs* for Scholle et al., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

BOYDEN *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 271, Misc. Decided November 21, 1966.

Appeal dismissed and certiorari denied.

Appellant *pro se*.

Thomas C. Lynch, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BATTAGLIA ET AL., DBA PRODUCE TRANSPORT DISPATCH *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 564. Decided November 21, 1966.

Affirmed.

Earle V. White for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert Ginnane and *Betty Jo Christian* for the United States et al. *Randall B. Kester, John F. Weisser, Jr., James W. Nisbet, J. D. Feeney* and *Ed White* for railroad appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

BOND ET AL. *v.* FLOYD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 87. Argued November 10, 1966.—Decided December 5, 1966.

Several months after the election in June 1965 to the Georgia House of Representatives of appellant Bond, a Negro, a civil rights organization of which he was a staff member issued an anti-war statement against the Government's Vietnam policy and the operation of the Selective Service laws. Bond endorsed the statement in a news interview stating among other things that as "a second class citizen" he was not required to support the war, as a pacifist he was opposed to all war, and he saw nothing inconsistent with his statement and his taking the oath of office. House members in petitions challenged Bond's right to be seated, charging that his statements aided our enemies, violated the Selective Service laws, discredited the House, and were inconsistent with the legislator's mandatory oath to support the Constitution. Following the House clerk's refusal to seat him, Bond, manifesting willingness to take the oath, challenged the petitions as depriving him of his First Amendment rights and being racially motivated. At a House committee hearing Bond amplified his views and denied having urged draft card burning or other law violations. Following the hearing, the committee concluded that Bond should not be seated and the House thereafter refused to seat him. Bond brought this action in District Court for injunctive relief and a declaratory judgment. The District Court, holding that it had jurisdiction to decide the constitutional issue, concluded that Bond had been accorded procedural due process through the hearing. It also held that the House had a rational basis for concluding that Bond's remarks exceeded criticism of national policy and that he could not in good faith take an oath to support the State and Federal Constitutions and thus could not meet a qualification for membership which the House had the power to impose. While Bond's appeal to this Court under 28 U. S. C. § 1253 from that decision was pending he was again elected as a Representative, in a special election. He was rejected by the House Rules Committee

when he declined to recant, and later was elected again, in the regular 1966 primary and general elections. *Held:*

1. This Court has jurisdiction to determine whether a disqualification for the office of state legislator under color of a proper constitutional standard violates First Amendment rights. P. 131.

2. In disqualifying Bond because of his statements the State violated the First Amendment made applicable to the States by the Fourteenth. Pp. 131–137.

(a) A majority of state legislators is not authorized to test the sincerity with which another duly elected legislator meets the requirement for holding office of swearing to support the Federal and State Constitutions. P. 132.

(b) The State may not apply to a legislator a First Amendment standard stricter than that applicable to a private citizen. Pp. 132–133.

(c) Bond's statements do not show an incitement to violate the Selective Service statute's prohibition of counselling against registration for military service. Pp. 133–134.

(d) Though a State may impose an oath requirement on legislators it cannot limit their capacity to express views on local or national policy. "[D]ebate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, 376 U. S. 254, 270. Pp. 135–136.

251 F. Supp. 333, reversed.

Howard Moore, Jr., and *Leonard B. Boudin* argued the cause for appellants. With them on the briefs was *Victor Rabinowitz.*

Arthur K. Bolton, Attorney General of Georgia, argued the cause for appellees. With him on the brief were *William L. Harper* and *Alfred L. Evans, Jr.*, Assistant Attorneys General, and *Paul L. Hanes*, Deputy Assistant Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Robert L. Carter* for the National Association for the Advancement of Colored People; *Melvin L. Wulf* and

Charles Morgan, Jr., for the American Civil Liberties Union et al.; and by *Joseph B. Robison* for the American Jewish Congress.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question presented in this case is whether the Georgia House of Representatives may constitutionally exclude appellant Bond, a duly elected Representative, from membership because of his statements, and statements to which he subscribed, criticizing the policy of the Federal Government in Vietnam and the operation of the Selective Service laws. An understanding of the circumstances of the litigation requires a complete presentation of the events and statements which led to this appeal.

Bond, a Negro, was elected on June 15, 1965, as the Representative to the Georgia House of Representatives from the 136th House District. Of the District's 6,500 voters, approximately 6,000 are Negroes. Bond defeated his opponent, Malcolm Dean, Dean of Men at Atlanta University, also a Negro, by a vote of 2,320 to 487.

On January 6, 1966, the Student Nonviolent Coordinating Committee, a civil rights organization of which Bond was then the Communications Director, issued the following statement on American policy in Vietnam and its relation to the work of civil rights organizations in this country:

> "The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law

when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

> "We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives—as painfully as in Viet Nam."

On the same day that this statement was issued, Bond was interviewed by telephone by a reporter from a local radio station, and, although Bond had not participated in drafting the statement, he endorsed the statement in these words:

> "Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States.
>
> . . . . .
>
> "Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever."

When the interviewer suggested that our involvement in Vietnam was because "if we do not stop Communism

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there that it is just a question of where will we stop it next," Bond replied:

> "Oh, no, I'm not taking a stand against stopping World Communism, and I'm not taking a stand in favor of the Viet Cong. What I'm saying that is, first, that I don't believe in that war. That particular war. I'm against all war. I'm against that war in particular, and I don't think people ought to participate in it. Because I'm against war, I'm against the draft. I think that other countries in the World get along without a draft—England is one—and I don't see why we couldn't, too.
>
> . . . . . .
>
> ". . . I'm not about to justify that war, because it's stopping International Communism, or whatever—you know, I just happen to have a basic disagreement with wars for whatever reason they are fought— . . . [F]ought to stop International Communism, to promote International Communism, or for whatever reason. I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States fighting in Viet Nam. I happen to live in the United States. If I lived in North Viet Nam I might not have the same sort of freedom of expression, but it happens that I live here—not there."

The interviewer also asked Bond if he felt he could take the oath of office required by the Georgia Constitution, and Bond responded that he saw nothing inconsistent between his statements and the oath. Bond was also asked whether he would adhere to his statements if war were declared on North Vietnam and if his statements might become treasonous. He replied that he did not know "if I'm strong enough to place myself in a position where I'd be guilty of treason."

Before January 10, 1966, when the Georgia House of Representatives was scheduled to convene, petitions challenging Bond's right to be seated were filed by 75 House members. These petitions charged that Bond's statements gave aid and comfort to the enemies of the United States and Georgia, violated the Selective Service laws, and tended to bring discredit and disrespect on the House. The petitions further contended that Bond's endorsement of the SNCC statement "is totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat." For the same reasons, the petitions asserted that Bond could not take an oath to support the Constitution of the United States. When Bond appeared at the House on January 10 to be sworn in, the clerk refused to administer the oath to him until the issues raised in the challenge petitions had been decided.

Bond filed a response to the challenge petitions in which he stated his willingness to take the oath and argued that he was not unable to do so in good faith. He further argued that the challenge against his seating had been filed to deprive him of his First Amendment rights, and that the challenge was racially motivated. A special committee was appointed to report on the challenge, and a hearing was held to determine exactly what Bond had said and the intentions with which he had said it.

At this hearing, the only testimony given against Bond was that which he himself gave the committee. Both the opponents Bond had defeated in becoming the Representative of the 136th District testified to his good character and to his loyalty to the United States. A recording of the interview which Bond had given to the reporter after the SNCC statement was played, and Bond was called to the stand for cross-examination. He there admitted his statements and elaborated his views. He

stated that he concurred in the SNCC statement "without reservation," and, when asked if he admired the courage of persons who burn their draft cards, responded:

> "I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question.
>
> . . . . . .
>
> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences."

Tapes of an interview Bond had given the press after the clerk had refused to give him the oath were also heard by the special committee. In this interview, Bond stated:

> "I stand before you today charged with entering into public discussion on matters of National interest. I hesitate to offer explanations for my actions or deeds where no charge has been levied against me other than the charge that I have chosen to speak my mind and no explanation is called for, for no member of this House, has ever, to my knowledge, been called upon to explain his public statements for public postures as a prerequisite to admission to that Body. I therefore, offer to my constituents a statement of my views. I have not counselled burning draft cards, nor have I burned mine. I have suggested that congressionally outlined alternatives to military service be extended to

building democracy at home. The posture of my life for the past five years has been calculated to give Negroes the ability to participate in formulation of public policies. The fact of my election to public office does not lessen my duty or desire to express my opinions even when they differ from those held by others. As to the current controversy because of convictions that I have arrived at through examination of my conscience I have decided I personally cannot participate in war.

"I stand here with intentions to take an oath—that oath they just took in there—that will dispel any doubts about my convictions or loyalty."

The special committee gave general approval in its report to the specific charges in the challenge petitions that Bond's endorsement of the SNCC statement and his supplementary remarks showed that he "does not and will not" support the Constitutions of the United States and of Georgia, that he "adheres to the enemies of the . . . State of Georgia" contrary to the State Constitution, that he gives aid and comfort to the enemies of the United States, that his statements violated the Universal Military Training and Service Act, § 12, 62 Stat. 622, 50 U. S. C. App. § 462, and that his statements "are reprehensible and are such as tend to bring discredit to and disrespect of the House." On the same day the House adopted the committee report without findings and without further elaborating Bond's lack of qualifications, and resolved by a vote of 184 to 12 that "Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives."

Bond then instituted an action in the District Court for the Northern District of Georgia for injunctive re-

lief and a declaratory judgment that the House action was unauthorized by the Georgia Constitution and violated Bond's rights under the First Amendment. A three-judge District Court was convened under 28 U. S. C. § 2281. All three members of the District Court held that the court had jurisdiction to decide the constitutionality of the House action because Bond had asserted substantial First Amendment rights.[1] On the merits, however, the court was divided.

Judges Bell and Morgan, writing for the majority of the court, addressed themselves first to the question of whether the Georgia House had power under state law to disqualify Bond based on its conclusion that he could not sincerely take the oath of office. They reasoned that separation-of-powers principles gave the Legislature power to insist on qualifications in addition to those specified in the State Constitution. The majority pointed out that nothing in the Georgia Constitution limits the qualifications of the legislators to those expressed in the constitution.

Having concluded that the action of the Georgia House was authorized by state law, the court considered whether Bond's disqualification violated his constitutional right of freedom of speech. It reasoned that the decisions of this Court involving particular state political offices supported an attitude of restraint in which the principles of separation of powers and federalism should be balanced against the alleged deprivation of individual constitutional rights. On this basis, the majority below fashioned the test to be applied in this case as being whether the refusal to seat Bond violated procedural or what it termed substantive due process. The court held that the hearing which had been given Bond by the House satisfied procedural due process. As for

[1] The opinion of the District Court is reported at 251 F. Supp. 333 (1966).

what it termed the question of substantive due process, the majority concluded that there was a rational evidentiary basis for the ruling of the House. It reasoned that Bond's right to dissent as a private citizen was limited by his decision to seek membership in the Georgia House. Moreover, the majority concluded, the SNCC statement and Bond's related remarks went beyond criticism of national policy and provided a rational basis for a conclusion that the speaker could not in good faith take an oath to support the State and Federal Constitutions:

> "A citizen would not violate his oath by objecting to or criticizing this policy or even by calling it deceptive and false as the statement did.
>
> "But the statement does not stop with this. It is a call to action based on race; a call alien to the concept of the pluralistic society which makes this nation. It aligns the organization with '. . . colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia . . . .' It refers to its involvement in the black people's struggle for liberation and self-determination . . . .' It states that 'Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law.' It alleges that Negroes, referring to American servicemen, are called on to stifle the liberation of Viet Nam.
>
> "The call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft." [2]

Chief Judge Tuttle dissented.[3] He reasoned that the question of the power of the Georgia House under the

[2] *Id.*, at 344.

[3] *Id.*, at 345.

State Constitution to disqualify a Representative under these circumstances had never been decided by the state courts, and that federal courts should construe state law, if possible, so as to avoid unnecessary federal constitutional issues. Since Bond satisfied all the stated qualifications in the State Constitution, Chief Judge Tuttle concluded that his disqualification was beyond the power of the House as a matter of state constitutional law.

Bond appealed directly to this Court from the decision of the District Court under 28 U. S. C. § 1253. While this appeal was pending, the Governor of Georgia called a special election to fill the vacancy caused by Bond's exclusion. Bond entered this election and won overwhelmingly. The House was in recess, but the Rules Committee held a hearing in which Bond declined to recant his earlier statements. Consequently, he was again prevented from taking the oath of office, and the seat has remained vacant. Bond again sought the seat from the 136th District in the regular 1966 election, and he won the Democratic primary in September 1966, and won an overwhelming majority in the election of November 8, 1966.[4]

The Georgia Constitution sets out a number of specific provisions dealing with the qualifications and eligibility of state legislators. These provide that Representatives shall be citizens of the United States, at least 21 years of age, citizens of Georgia for two years, and residents for one year of the counties from which elected.[5] The

[4] A question was raised in oral argument as to whether this case might not be moot since the session of the House which excluded Bond was no longer in existence. The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded.

[5] Georgia Const., Art. 3, § 6 (§ 2–1801, Ga. Code Ann.).

Georgia Constitution further provides that no one convicted of treason against the State, or of any crime of moral turpitude, or of a number of other enumerated crimes may hold any office in the State.[6] Idiots and insane persons are barred from office,[7] and no one holding any state or federal office is eligible for a seat in either house.[8] The State Constitution also provides:

> "Election, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs." [9]

These constitute the only stated qualifications for membership in the Georgia Legislature and the State concedes that Bond meets all of them. The Georgia Constitution also requires Representatives to take an oath stated in the Constitution:

> "Oath of members.—Each senator and Representative, before taking his seat, shall take the following oath, or affirmation, to-wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.'" [10]

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[6] Georgia Const., Art. 2, § 2 (§ 2-801, Ga. Code Ann.).
[7] *Ibid.*
[8] Georgia Const., Art. 3, § 4 (§ 2-1606, Ga. Code Ann.).
[9] Georgia Const., Art. 3, § 7 (§ 2-1901, Ga. Code Ann.).
[10] Georgia Const., Art. 3, § 4 (§ 2-1605, Ga. Code Ann.).

The State points out in its brief that the latter part of this oath, involving the admonition to act in the best interests of the State, was not the standard by which Bond was judged.

The State does not claim that Bond refused to take the oath to support the Federal Constitution, a requirement imposed on state legislators by Art. VI, cl. 3, of the United States Constitution:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Tests shall ever be required as a Qualification to any Office or public Trust under the United States."

Instead, it argues that the oath provisions of the State and Federal Constitutions constitute an additional qualification. Because under state law the legislature has exclusive jurisdiction to determine whether an elected Representative meets the enumerated qualifications, it is argued that the legislature has power to look beyond the plain meaning of the oath provisions which merely require that the oaths be taken. This additional power is said to extend to determining whether a given Representative may take the oath with sincerity. The State does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards.[11] But the State argues that there can be no

[11] See *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), in which the Court stated: "When a State exercises power wholly within the

doubt as to the constitutionality of the qualification involved in this case because it is one imposed on the State Legislatures by Article VI of the United States Constitution. Moreover, the State contends that no decision of this Court suggests that a State may not ensure the loyalty of its public servants by making the taking of an oath a qualification of office. Thus the State argues that there should be no judicial review of the legislature's power to judge whether a prospective member may conscientiously take the oath required by the State and Federal Constitutions.

We are not persuaded by the State's attempt to distinguish, for purposes of our jurisdiction, between an exclusion alleged to be on racial grounds and one alleged to violate the First Amendment. The basis for the argued distinction is that, in this case, Bond's disqualification was grounded on a constitutional standard—the requirement of taking an oath to support the Constitution. But Bond's contention is that this standard was utilized to infringe his First Amendment rights, and we cannot distinguish, for purposes of our assumption of jurisdiction, between a disqualification under an unconstitutional standard and a disqualification which, although under color of a proper standard, is alleged to violate the First Amendment.

We conclude as did the entire court below that this Court has jurisdiction to review the question of whether the action of the Georgia House of Representatives deprived Bond of federal constitutional rights, and we now move to the central question posed in the case—whether Bond's disqualification because of his statements violated

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domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S., at 347.

the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment.

The State argues that the exclusion does not violate the First Amendment because the State has a right, under Article VI of the United States Constitution, to insist on loyalty to the Constitution as a condition of office. A legislator of course can be required to swear to support the Constitution of the United States as a condition of holding office, but that is not the issue in this case, as the record is uncontradicted that Bond has repeatedly expressed his willingness to swear to the oaths provided for in the State and Federal Constitutions. Nor is this a case where a legislator swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath. Thus, we do not quarrel with the State's contention that the oath provisions of the United States and Georgia Constitutions do not violate the First Amendment. But this requirement does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution. Such a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution. Certainly there can be no question but that the First Amendment protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system. The State does not contend otherwise. But it argues that Bond went beyond expressions of opposition, and counseled violations of the Selective Service laws, and that advocating violation of federal law demonstrates a lack of support for the Constitution. The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even though such

a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree.

Bond could not have been constitutionally convicted under 50 U. S. C. App. § 462 (a), which punishes any person who "counsels, aids, or abets another to refuse or evade registration." [12] Bond's statements were at worst unclear on the question of the means to be adopted to avoid the draft. While the SNCC statement said "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft," this statement alone cannot be interpreted as a call to unlawful refusal to be drafted. Moreover, Bond's supplementary statements tend to resolve the opaqueness in favor of legal alternatives to the draft, and there is no evidence to the contrary. On the day the statement was issued, Bond explained that he endorsed it "because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to

[12] The pertinent provisions of § 462 (a) are as follows:

"[A]ny person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title . . . , or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title . . . , or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . . , or of said rules, regulations, or directions, . . . or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

encourage people not to participate in it for any reason that they choose." In the same interview, Bond stated categorically that he did not oppose the Vietnam policy because he favored the Communists; that he was a loyal American citizen and supported the Constitution of the United States. He further stated "I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States fighting in Viet Nam." At the hearing before the Special Committee of the Georgia House, when asked his position on persons who burned their draft cards, Bond replied that he admired the courage of persons who "feel strongly enough about their convictions to take an action like that knowing the consequences that they will face." When pressed as to whether his admiration was based on the violation of federal law, Bond stated:

> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences."

Certainly this clarification does not demonstrate any incitement to violation of law. No useful purpose would be served by discussing the many decisions of this Court which establish that Bond could not have been convicted for these statements consistently with the First Amendment. See, *e. g., Wood* v. *Georgia,* 370 U. S. 375 (1962); *Yates* v. *United States,* 354 U. S. 298 (1957); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949). Nor does the fact that the District Court found the SNCC statement to have racial overtones constitute a reason for holding it out-

side the protection of the First Amendment. In fact the State concedes that there is no issue of race in the case.

The State attempts to circumvent the protection the First Amendment would afford to these statements if made by a private citizen by arguing that a State is constitutionally justified in exacting a higher standard of *loyalty* from its legislators than from its citizens. Of course, a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens. But this difference in treatment does not support the exclusion of Bond, for while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.[13] The manifest function of

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[13] Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, The Making of the Constitution 420–422 (1937). The Journal of the Federal Convention of 1787 states:

"Mr. Madison was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. . . . Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction.

. . . . . .

"Mr. Madison observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy

the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), is that "debate on public issues should be uninhibited, robust, and wide-open." We think the rationale of the *New York Times* case disposes of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates

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of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." 2 Farrand, The Records of the Federal Convention of 1787, pp. 249–250 (Aug. 10, 1787).

Hamilton agreed with Madison that:

"The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature." The Federalist, No. 60, p. 409 (Cooke ed. 1961).

by the person they have elected to represent them. We therefore hold that the disqualification of Bond from membership in the Georgia House because of his statements violated Bond's right of free expression under the First Amendment. Because of our disposition of the case on First Amendment grounds, we need not decide the other issues advanced by Bond and the *amici*.[14]

The judgment of the District Court is

Reversed.

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[14] Bond argues that the action of the Georgia House was not authorized by state law, that if the State Constitution allows this exclusion it does so pursuant to an oath which is unconstitutionally vague, that the exclusion was based on statements protected by the First Amendment, and that the exclusion is a bill of attainder and an *ex post facto* law. In addition, *amicus* briefs filed in support of appellant Bond add the arguments that the decision not to seat him was inextricably involved with race prejudice and that it violated the guarantee of a republican form of government clause.

Similarly, we need not pass on the standing of two of Bond's constituents who joined in the suit below. The majority below dismissed the complaint as to these two constituents because they lacked a sufficiently direct interest in the controversy as would give them standing. The majority noted that it was appropriate to dismiss the case as to Bond's constituents because Bond's complaint would resolve every issue necessary to a decision in the case. We express no opinion on the question of whether Bond's constituents can claim that concrete adverseness which would be necessary to give them standing.

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UNITED STATES *v.* ACME PROCESS EQUIPMENT CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 86. Argued November 9, 1966.—Decided December 5, 1966.

Respondent sued the Government in the Court of Claims for damages for breach of contract to manufacture rifles. The United States asserted as a defense that it canceled the contract because three of respondent's key employees had accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act. The Court of Claims found that the kickbacks had been paid and that this was the basis for the cancellation but construed the Act as not authorizing such action. *Held:* The Act, which clearly expresses a policy hostile to kickbacks, authorized the United States to cancel this contract. Pp. 142–148.

171 Ct. Cl. 324, 347 F. 2d 509, reversed.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Assistant Attorney General Douglas, Richard A. Posner, David L. Rose* and *Robert V. Zener.*

Jack Rephan argued the cause for respondent. With him on the brief were *Raymond R. Dickey* and *Bernard Gordon.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Acme Process Equipment Company, brought this action against the United States in the Court of Claims to recover damages for breach of a contract under which Acme undertook through itself and subcontractors to manufacture 2,751 75-mm. recoilless rifles for about $337 per rifle. Among other defenses, the United States alleged that it had rightfully canceled its contract with Acme because three of Acme's principal employees had accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act set out

in part below.[1] The Court of Claims found, as facts, that the kickbacks had been paid as alleged and that this was the ground on which the United States had canceled the prime contract with Acme, but construed the Act as not authorizing the cancellation. 171 Ct. Cl. 324, 347 F. 2d 509. We hold that it does.

I.

In October 1952, Acme hired Harry Tucker, Jr., and his associate, James Norris, for the purpose of establishing and managing a new division of the company to handle government contracts. Norris was made general manager of production with authority to submit bids, sign government contracts, and award subcontracts. Tucker was placed in charge of sales, government con-

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[1] Section 1 of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U. S. C. § 51, provides in pertinent part:

"That the payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, . . . (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever . . . as an inducement for the award of a subcontract or order from the prime contractor . . . is hereby prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor . . . . The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff . . . or by an action in an appropriate court of the United States. . . ."

Section 4 of the Act, 41 U. S. C. § 54, provides:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

tracts, and expediting subcontract operations. Prior to this time Tucker had entered into a contract with All Metals Industries, Inc., under which he was to receive a commission for all sales to customers, including Acme, procured by him. Tucker's employment contract with Acme specifically stated that he represented and would continue to represent firms in other lines of business, but Acme did not consult with any of his other clients at the time Tucker was hired.

Late in October, Tucker advised his superiors at Acme of the proposed Army contract for rifles, and at Tucker's suggestion, Acme submitted a bid of $337 per rifle. Since Acme's bid was the lowest, the Army began negotiations with Acme culminating in the award of the contract in January 1953. The negotiations were handled by Tucker and Norris for Acme. Since it was contemplated that the project would be largely subcontracted, leaving to Acme only the final finishing and assembly of components, the Army expressed a keen interest in Acme's proposed subcontractors. Not only did it review Acme's subcontracting plans and require Acme to notify it of changes in those plans during the final stages of negotiation, but the contract eventually awarded required government approval of all subcontracts in excess of $25,000. All Metals, because its proposed subcontract amounted to one-third of the amount of the prime contract, actually participated in the negotiations between Acme and the Army.

During this period of negotiation two other developments took place. Tucker obtained agreements from two other potential subcontractors to pay him commissions on any orders he could procure from Acme. Army contracting officers warned Acme's president, Joshua Epstein, that Tucker was suspected of having engaged in contingent-fee arrangements with other government contractors.

Finally, Acme was awarded the prime contract. Although the price was fixed at $337 per rifle, the contract contained a price redetermination clause under which, after 30% of the rifles were delivered, the parties could negotiate the price on past and future shipments upward or downward, with an upper limit of $385 per rifle. Within a few weeks after the prime contract was awarded, All Metals and the other two companies with which Tucker had prior kickback arrangements obtained subcontracts from Acme.[2] Tucker was paid his kickbacks, but, apparently unsatisfied with the amount of his payoff, he got Jack Epstein, the superintendent of the chief Acme plant and the son of Acme's president and principal stockholder, to join the kickback conspiracy. Together Epstein and Tucker threatened to cancel All Metals' subcontract unless it paid $25,000 to a dummy corporation owned by Tucker, Norris, and Epstein for fictitious consulting services. All Metals reluctantly acceded to the shakedown. The amount paid to Tucker, Norris, and Epstein was charged to Acme through an increase in the subcontract price.

Although they knew that Tucker was representing other companies and had been notified of the Army's suspicions of Tucker's involvement in contingent-fee arrangements, other officials of Acme were not aware of the kickback activities of Tucker, Norris, and Epstein until late in 1953. At that time, Acme's president caused the resignation of the three suspected officials.

In 1956 Tucker, Norris, and Epstein were indicted for violation of the then Anti-Kickback Act, 60 Stat. 37.[3]

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[2] Shortly after the prime contract was awarded, two other companies paid Tucker's father and Norris' assistant kickbacks for obtaining subcontracts from Acme. This made a total of five subcontracts obtained through kickbacks.

[3] This was the original Anti-Kickback Act passed by Congress in 1946. It expressly prohibited kickbacks only to employees of "a

After presentation of the Government's case, the District Court granted the defendants' motion for acquittal on the ground that the Act—which at that time embraced only "cost-plus-a-fixed-fee or other cost reimbursable" government contracts—did not apply to Acme's contract, a fixed-price contract with a provision for limited price redetermination. The court found the defendants' actions "despicable and morally reprehensible, but unfortunately within the narrow letter of the law." The court recommended that Congress amend the Anti-Kickback Act "to include as a crime the vicious and immoral type of conduct that has been exhibited in this case." *United States* v. *Norris*, Crim. No. 18535 (D. C. E. D. Pa.), April 14, 1956.

The District Court's opinion did indeed spur the Comptroller General to recommend amendatory legislation and in 1960 the Anti-Kickback Act was amended to apply to all "negotiated contracts."[4] The civil provision of the amended Act was made retroactive to allow government recovery of kickbacks "whether heretofore or hereafter paid or incurred by the subcontractor."

II.

The Anti-Kickback Act, as originally passed in 1946 and as amended in 1960, provides two express sanctions for its violation: (1) fine or imprisonment for one who makes or receives a kickback, and (2) recovery of the kickback by the United States. The Court of Claims held, and it is argued here, that had Congress wanted "to provide the additional remedy of contract annulment, it could have done so" by express language, 171 Ct. Cl., at 343, 347 F. 2d, at 521, and of course it could

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prime contractor holding a contract . . . on a cost-plus-a-fixed-fee or other cost reimbursable basis . . . ."

[4] See generally H. R. Rep. No. 1880, S. Rep. No. 1585, 86th Cong., 2d Sess. The Act, as amended, is set out in part in note 1, *supra*.

have. But the fact that it did not see fit to provide for such a remedy by express language does not end the matter. The Anti-Kickback Act not only "prohibited" such payments, but clearly expressed a policy decidedly hostile to them. They were recognized as devices hurtful to the Government's procurement practices. Extra expenditures to get subcontracts necessarily add to government costs in cost-plus-a-fixed-fee and other cost reimbursable contracts. And this is also true where the prime contract is a negotiated fixed-price contract with a price redetermination clause, such as this prime contract is here. The kickbacks here are passed on to the Government in two stages. The prime contractor rarely submits his bid until after he has tentatively lined up his subcontractors. Indeed, as here, the subcontractors frequently participate in negotiation of the prime contract. The subcontractor's tentative bid will, of course, reflect the amount he contemplates paying as a kickback, and then his inflated bid will be reflected in the prime contractor's bid to the Government. At the renegotiation stage, where the prime contractor's actual cost experience is the basis for price redetermination, any kickbacks, paid by subcontractors and passed on to the prime contractor after the prime contract is awarded, will be passed on to the Government in the form of price redetermination upward.[5]

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[5] This is precisely what happened here before the Government canceled Acme's contract. Acme in 1953 submitted cost data for price redetermination purposes that included the charges of the five subcontractors which had paid kickbacks to Acme's employees. These subcontracting charges in turn included the amounts paid as kickbacks. Had the kickbacks not been discovered and the contract not been canceled, Acme would have been able to use these costs to renegotiate the price per rifle from $337 to $385. Such price redetermination could have cost the Government about $132,000 more on the entire contract.

Acme argues, however, that the express provision for recovery of kickbacks is enough to protect the Government from increased costs attributable to them. But this argument rests on two false assumptions. The first is that kickbacks can easily be detected and recovered. This is hardly the case. Kickbacks being made criminal means that they must be made—if at all—in secrecy. Though they necessarily inflate the price to the Government, this inflation is rarely detectable. This is particularly true as regards defense contracts where the products involved are not usually found on the commercial market and where there may not be effective competition. Such contracts are generally negotiated and awarded without formal advertising and competitive bidding, and there is often no opportunity to compare going prices with the price negotiated by the Government.[6] Kickbacks will usually not be discovered, if at all, until after the prime contract is let. The second false assumption underlying Acme's argument is that the increased cost to the Government is necessarily equal to the amount of the kickback which is recoverable. Of course, a subcontractor who must pay a kickback is likely to include the amount of the kickback in his contract price. But this is not all. A subcontractor who anticipates obtaining a subcontract by virtue of a kickback has little incentive to stint on his cost estimates. Since he plans to obtain the subcontract without regard to the economic merits of his proposal, he will be tempted to inflate that proposal by more than the amount of the kickback. And even if the Government could isolate and recover the inflation attributable to the kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in

[6] See S. Rep. No. 1585, *supra*, n. 4, at 3.

turn undermines the security of the prime contractor's performance—a result which the public cannot tolerate, especially where, as here, important defense contracts are involved.

III.

In *United States* v. *Mississippi Valley Co.*, 364 U. S. 520, 563, the Court recognized that "a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment." The Court there approved the cancellation of a government contract for violation of the conflict-of-interest statute on the ground that "the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in" the statute. *Ibid.* We think the same thing can be said about cancellation here.

The Court of Claims, in holding that the Anti-Kickback Act does not authorize government cancellation because of its violation, distinguished *Mississippi Valley Co.* on the ground that the Anti-Kickback Act, unlike the conflict-of-interest statute, provides a civil as well as a criminal remedy. But we do not deem the provision of a civil remedy in the Anti-Kickback Act decisive. Where there is a mere conflict of interest, no concrete monetary rewards may have been received or paid which the Government can recover in a civil action. But where there is commercial bribery in the form of a kickback, there is something specific which the Government can recover, and hence it was quite natural for Congress to provide this express remedy. There is absolutely no indication in the legislative history of the Anti-Kickback Act that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act.

There is likewise no merit to the Court of Claims' distinction of the *Mississippi Valley Co.* case on the ground that there the criminal provision of the conflict-of-interest statute was violated whereas here the kickback conspirators were acquitted of violating the Anti-Kickback Act as it existed when the kickbacks occurred, prior to 1960. As we have seen, Acme's employees were acquitted on the technical ground that Acme's prime contract was not a "cost reimbursable" contract to which the Act then expressly applied. It is unnecessary for us to decide whether this holding was correct.[7] For whether the kickbacks here contravened the narrow letter of the criminal law, strictly construed, they clearly were violative of the public policy against kickbacks first expressed by Congress in 1946. If Congress then limited the reach of the Act to cost reimbursable contracts, it was only because other types of negotiated contracts were rarely in use then. Though the recent extensive use of other forms of negotiated contracts led Congress in 1960 to amend the Act to cover clearly these types of contracts and to close the technical loophole opened by the acquittal of Acme's employees, the congressional policy against *all* kickbacks was not changed. Congress merely reiterated its recognition of the evil and sought to correct the letter of the law to effectuate its long-standing policy. In making the civil remedy of the 1960 Act retroactive, Congress clearly indicated that there had been no basic change in the public policy against kickbacks.

This public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks.

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[7] See *United States* v. *Barnard*, 255 F. 2d 583, cert. denied, 358 U. S. 919, holding that a fixed-price contract with provision for unlimited price redetermination is a "cost reimbursable" contract.

Though the kickbacks did not take place until after the prime contract was awarded to Acme, the kickback arrangements existed either at the time the prime contract was awarded or shortly thereafter, and at least one of the kickbacking subcontractors actually participated in the negotiation of the prime contract. These circumstances, as well as the price redetermination feature of the prime contract, produced a great likelihood that the cost of the prime contract to the Government and the reliability of Acme's performance under it would be directly affected by the fact that the prime contract was to be performed largely through subcontracts obtained by kickbacks.

The Court of Claims, in holding that the Act does not authorize government cancellation because of kickbacks, relied heavily on its finding that none of the officers of Acme were aware of the kickbacks. But as previously stated those of Acme's employees and agents who did know were in the upper echelon of its managers. One of the guilty employees was the general manager of one of the company's chief plants and the son of Acme's president, and the two other kickback receivers were in charge of operations, sales, and government contracts. They were the kind of company personnel for whose conduct a corporation is generally held responsible. Cf. *Gleason* v. *Seaboard Air Line R. Co.*, 278 U. S. 349. Since Acme selected those agents to carry on its business in obtaining and performing government contracts, there is no obvious reason why their conduct in that field should not be considered as Acme's conduct, particularly where it touches the all-important subject of kickbacks. And here, as this Court said about the conflict-of-interest statute in *United States* v. *Mississippi Valley Co., supra,* at 565, it is appropriate to say that it is the "inherent difficulty in detecting corruption which requires that

contracts made in violation of . . . [the Anti-Kickback Act] be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent."

The judgment of the Court of Claims is reversed with directions to sustain the United States' right to cancel the prime contract.

It is so ordered.

UNITED STATES *v.* DEMKO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 76. Argued November 8, 1966.—Decided December 5, 1966.

Respondent, a federal prisoner, was injured while performing an assigned prison task. He filed claim for compensation benefits under 18 U. S. C. § 4126, and received an award which was to be paid monthly upon discharge and to continue while he was disabled. He then filed suit under the Federal Tort Claims Act. The Government's defense that the § 4126 remedy was exclusive was rejected by the District Court, and the Court of Appeals affirmed. *Held:* The compensation system provided in 18 U. S. C. § 4126 reasonably and fairly covers federal prisoners who are injured in prison employment and is the exclusive remedy to protect that group. *United States* v. *Muniz*, 374 U. S. 150, distinguished. Pp. 151–154.

350 F. 2d 698, reversed.

Richard S. Salzman argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Douglas, Robert S. Rifkind* and *Morton Hollander.*

Gerald N. Ziskind argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent Demko, a federal prisoner, was seriously injured in 1962 in the performance of an assigned prison task in a federal penitentiary. Shortly afterward he filed a claim for compensation benefits under 18 U. S. C. § 4126. That law, first enacted by Congress in 1934, authorized the Federal Prison Industries, Inc., a federal corporation, to use its funds "in paying, under rules and regulations promulgated by the Attorney General, compensation . . . to inmates or their dependents

for injuries suffered in any industry." [1] Under that law and regulations promulgated under it, respondent was awarded $180 per month which was to start on discharge from prison and continue so long as disability continued.[2] After winning this compensation award, respondent brought this action against the United States in the Federal District Court under the Federal Tort Claims Act,[3] alleging that his injury was due to the Government's negligence for which he was entitled to recover additional damages under that Act. The United States defended on the single ground that respondent's right to recover compensation under 18 U. S. C. § 4126 was his exclusive remedy against the Government barring him from any suit under the Federal Tort Claims Act. The District Court, holding that compensation under 18 U. S. C. § 4126 was not his exclusive remedy, rejected this defense and accordingly entered a judgment for the respondent against the United States for tort claim damages based on stipulated facts. The Court of Appeals for the Third Circuit affirmed. 350 F. 2d 698. Subsequently the Court of Appeals for the Second Circuit, in *Granade* v. *United States*, 356 F. 2d 837, reached precisely the opposite result, holding that a prison inmate, injured in prison employment and eligible for compensation under 18 U. S. C. § 4126, is precluded from suing under the Federal Tort Claims Act. To resolve this conflict we granted certiorari. 383 U. S. 966.

[1] Act of June 23, 1934, c. 736, § 4, 48 Stat. 1211. The Federal Prison Industries was established as a District of Columbia corporation and a "governmental body" to expand an industrial training and rehabilitation program for prisoners initiated by the Act of May 27, 1930, c. 340, 46 Stat. 391.

[2] On August 1, 1966, Federal Prison Industries, Inc., raised respondent's award to $245.31 per month under authority of the Act of July 4, 1966, 80 Stat. 252, amending the Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[3] 28 U. S. C. §§ 1346 (b), 2671 *et seq.*

Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. *Johansen* v. *United States,* 343 U. S. 427, and *Patterson* v. *United States,* 359 U. S. 495, for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws.[4] In *Johansen* v. *United States, supra,* at 441, this Court stated that where "the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." Later in *Patterson* v. *United States, supra,* at 496, this Court em-

[4] The lower federal courts have held, uniformly, that persons for whom the Government has supplied an administrative compensation remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799, cert. denied, 382 U. S. 831; *Rizzuto* v. *United States,* 298 F. 2d 748; *Lowe* v. *United States,* 292 F. 2d 501; *Somma* v. *United States,* 283 F. 2d 149; *Mills* v. *Panama Canal Co.,* 272 F. 2d 37, cert. denied, 362 U. S. 961; *United States* v. *Forfari,* 268 F. 2d 29, cert. denied, 361 U. S. 902; *Balancio* v. *United States,* 267 F. 2d 135, cert. denied, 361 U. S. 875; *Aubrey* v. *United States,* 103 U. S. App. D. C. 65, 254 F. 2d 768; *United States* v. *Firth,* 207 F. 2d 665; *Lewis* v. *United States,* 89 U. S. App. D. C. 21, 190 F. 2d 22, cert. denied, 342 U. S. 869. See also *Gradall* v. *United States,* 161 Ct. Cl. 714, 329 F. 2d 960, 963; *Denenberg* v. *United States,* 158 Ct. Cl. 401, 305 F. 2d 378, 379–380.

phatically refused to abandon the *Johansen* ruling, calling attention to the fact that Congress by specific statute could change the *Johansen* "policy at any time." Consequently we decide this case on the *Johansen* principle that, where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group.

There is no indication of any congressional purpose to make the compensation statute in 18 U. S. C. § 4126 nonexclusive. It was enacted in 1934, and provided for injured federal prisoners the only chance they had to recover damages of any kind. Its enactment was 12 years prior to the 1946 Federal Tort Claims Act. There is nothing in the legislative history of this latter Act which pointed to any purpose to add tort claim recovery for federal prisoners after they had already been protected by 18 U. S. C. § 4126. Indeed to hold that the 1946 Federal Tort Claims Act was designed to have such a supplemental effect would be to hold that injured prisoners are given greater protection than all other government employees who are protected exclusively by the Federal Employees' Compensation Act,[5] a congressional purpose not easy to infer.

The court below refused to accept the prison compensation law as an exclusive remedy because it was deemed not comprehensive enough. We disagree. That law, as shown by its regulations, its coverage and the amount of its payments to the injured and their dependents, compares favorably with compensation laws all over the country.[6] While there are differences in the way it protects its beneficiaries, these are due in the main to the differing circumstances of prisoners and nonprisoners. That law, as the Solicitor General points out, offers far

[5] 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[6] The regulations governing awards of workmen's compensation to federal prisoners appear at 28 CFR §§ 301.1–301.10 (1965 rev.).

more liberal payments than many of the state compensation laws, and its standard of payments for prisoners rests on the schedules of payment of the Federal Employees' Compensation Act which Congress has provided to take care of practically all government employees. This particular federal compensation law, created to meet, in the accepted fashion of such laws, the special need of a class of prisoners, has now for more than 30 years functioned to the satisfaction of Congress, except as Congress broadened its coverage in 1961.[7] Until Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery by common-law torts.

The court below was of the opinion that its holding was required by *United States* v. *Muniz,* 374 U. S. 150. We think not. Whether a prisoner covered by the prison compensation law could also recover under the Federal Tort Claims Act was neither an issue in nor decided by *Muniz.* As our opinion in *Muniz* noted, neither of the two prisoners there was covered by the prison compensation law. What we decided in *Muniz* was that the two prisoners there involved, who were not protected by the prison compensation law, were not barred from seeking relief under the Federal Tort Claims Act. However, that is not this case. The decision in *Muniz* could not possibly control our decision here because respondent is protected by the prison compensation law.[8] All

[7] In 1961 Congress expanded the coverage of 18 U. S. C. § 4126 to include not only prisoners' injuries suffered in "any industry" but also in "any work activity in connection with the maintenance or operation of the institution where confined." Act of September 26, 1961, 75 Stat. 681, 18 U. S. C. § 4126.

[8] In this case, the Government stipulated that respondent's "right to compensation pursuant to 18 U. S. C. [§]4126 is not affected by this suit. Regardless of the outcome of this suit [respondent] will have the same right to compensation as if suit had not been instituted."

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other arguments of respondent have been considered but we find none sufficient to justify recovery under the Federal Tort Claims Act. The judgments of the courts below are reversed with direction to sustain the Government's defense that respondent's recovery under the prison compensation law is exclusive.

Reversed.

MR. JUSTICE WHITE, whom MR. JUSTICE DOUGLAS joins, dissenting.

United States v. *Muniz*, 374 U. S. 150, held that action under the Federal Tort Claims Act was available to federal prisoners injured by the negligence of government employees. Given that case, the respondent, who was injured by government negligence while a federal prisoner, is entitled to relief unless the compensation available to him under 18 U. S. C. § 4126 is his exclusive remedy, a proposition which rests on the intent of Congress to give § 4126 that effect. Certainly the section does not in so many words exclude other remedies; and in my view exclusivity should not be inferred, for § 4126 is neither comprehensive nor certain and does not meet the tests of *Johansen* v. *United States*, 343 U. S. 427, and of *Patterson* v. *United States*, 359 U. S. 495. Section 4126 permits, but does not require, the application of prison industries income to some form of compensation scheme. The scheme adopted by the Attorney General applies to only a limited class of prisoners—those doing prison industry, maintenance, or similar work. A prisoner injured in prison industry work gets no compensation under the plan until he is released and none then if he has completely recovered. Furthermore, his payments stop if he is reincarcerated. If he dies while in prison, he gets nothing at all. On the other hand, if a prisoner is injured by the negligence of a prison guard and is not covered by the § 4126 plan, he may sue and

recover under the Tort Claims Act. Recovery is his and when he gets it, he keeps it whether or not he dies before his prison term expires and whether or not he is released and then again imprisoned.

Essentially, I agree with Judge Freedman, who wrote the opinion for the Court of Appeals for the Third Circuit. The following is a passage from his opinion:

> "Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in [*Feres* v. *United States*] as being 'simple, certain, and uniform' (340 U. S., at 144 . . .) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employes under the Federal Employees' Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General, but may not under the statute exceed the amount payable under the Federal Employees' Compensation Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release. There is no provision for the claimant to have a personal physician present at his physical examination, and there is no opportunity for administrative review. Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.

> "What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees' Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act." 350 F. 2d 698, 700–701. (Footnotes omitted.)

Nor does respondent claim the right to cumulate his remedies; he concedes that recovery under the compensation scheme must be offset against any negligence award he would otherwise receive.

Respectfully, I dissent.

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION *v.* UNION PACIFIC RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 28. Argued October 19, 1966.—Decided December 5, 1966.

Claiming that under its collective bargaining agreement its members were entitled to automated jobs which respondent railroad had assigned to the clerks' union, petitioner, the telegraphers' union, complained to the Railroad Adjustment Board. The clerks' union, given notice of the proceeding, declined to participate though manifesting readiness to file a like proceeding should its members' jobs be threatened. Without considering the railroad's liability under its contract with the clerks, the Board held the telegraphers entitled to the jobs and ordered the railroad to pay them. The telegraphers brought this action in District Court to enforce the award. Holding that the clerks' union was an indispensable party, that court dismissed the case and the Court of Appeals affirmed. *Held:* The Railroad Adjustment Board must exercise its exclusive jurisdiction to settle the entire work-assignment dispute between the competing unions in one proceeding. *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, followed. Pp. 160–166.

349 F. 2d 408, affirmed and remanded.

Milton Kramer argued the cause for petitioner. With him on the briefs were *Lester P. Schoene* and *Martin W. Fingerhut.*

James A. Wilcox argued the cause for respondent. With him on the brief was *H. Lustgarten, Jr.*

Clarence M. Mulholland, Edward J. Hickey, Jr., and *Richard R. Lyman* filed a brief for the Railway Labor Executives' Association, as *amicus curiae*, urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Transportation-Communication Employees Union, the petitioner, is the bargaining representative of a group

of railroad employees commonly known as "Telegraphers." Prior to 1952 these telegraphers were commonly assigned the duty of sending, by telegraph, railroad way bills, manifests and orders prepared by clerks, members of the brotherhood of Railway Clerks. In 1952, however, the respondent here, Union Pacific Railroad Company, installed IBM machines which resulted in a radical change in the workload of the telegraphers and clerks. When the clerical work previously done by the clerks is manually performed on the IBM machines, the machines automatically perform the communications functions previously performed by the telegraphers. As a result, the railroad's need for telegraphers was practically eliminated and operation of the IBM machines was assigned to members of the clerks' union. This case arises out of the dispute over the railroad's assignment of these jobs to the clerks. The telegraphers' union, claiming the jobs for its members under its collective bargaining agreement, protested the railroad's assignment and, in due course, referred its claim to the Railroad Adjustment Board as authorized by § 3 First (i) of the Railway Labor Act.[1] Notice of the referral was given to the clerks' union, which, pursuant to an understanding with the other labor unions, declined to participate in this proceeding on the ground that it had no interest in the matter but stated its readiness to file a

[1] This section provides:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner . . . but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 44 Stat. 578, as amended, 48 Stat. 1191, 45 U. S. C. § 153 First (i).

like proceeding before the Board to protect its members should any of their jobs be threatened.[2] The Board then heard and decided the case without considering the railroad's liability to the clerks under its contract with them, concluded that the telegraphers were entitled to the jobs under their contract, and ordered that the railroad pay the telegraphers who had been idle because of the assignment of the jobs to the clerks. The telegraphers' union then brought this action in a United States District Court to enforce the Board's award as authorized by § 3 First (p) of the Act. That court dismissed the case on the ground that the clerks' union was an indispensable party, and that the telegraphers, though given the opportunity, refused to make it a party. 231

[2] Section 3 First (j) of the Act, 45 U. S. C. § 153 First (j), requires the Adjustment Board to "give due notice of all hearings to the employee or employees and the carrier or carriers *involved* in any disputes submitted to them." (Emphasis supplied.) Prior to this case it was the policy of the various railroad unions, including the clerks' and telegraphers', in work-assignment disputes submitted to the Board, to refuse to give notice of and to prohibit participation in Board proceedings by anyone but the involved railroad and the petitioning union. This policy, followed by the labor members of the Board, resulted in no notice being given to the nonpetitioning union. See *Whitehouse* v. *Illinois Cent. R. Co.*, 349 U. S. 366, 372. In 1959, after some courts had refused to enforce the Board's awards where it had failed to notify the nonpetitioning union, see, *e. g.*, *Order of R. R. Telegraphers* v. *New Orleans, T. & M. R. Co.*, 229 F. 2d 59, cert. denied, 350 U. S. 997, the Railway Labor Executives' Association, composed of the various railroad unions, changed this policy to the extent that notice would henceforth be given to nonpetitioning unions. Yet the Railway Labor Executives' Association prescribed a form-letter response—to be sent by the notified nonpetitioning union to the Board—which disavowed any interest in the dispute and declined the opportunity to participate before the Board except in a subsequent and separate proceeding initiated by the nonpetitioning union in the event the Board's decision adversely affected its members' jobs. The clerks' union used this form letter to respond to the § 3 First (j) notice in the instant case.

F. Supp. 33. Affirming the dismissal, the Court of Appeals pointed out that the Board had failed to carry out its exclusive jurisdictional responsibility to decide the entire dispute with relation to the conflicting claims of the two unions under their respective contracts to have the jobs assigned to their members.[3] We granted certiorari in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present. Cf. *Whitehouse* v. *Illinois Cent. R. Co.*, 349 U. S. 366, 371–372. We hold that it must.

I.

Petitioner contends that it is entirely appropriate for the Adjustment Board to resolve disputes over work assignments in a proceeding in which only one union participates and in which only that union's contract with the employer is considered. This contention rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties. On this basis it is quite naturally assumed that a dispute over work assignments is a dispute between an employer and only one union. Thus, it is argued that each collective bargaining agreement is a thing apart from all others and each dispute over work assignments must be decided on the language of a single such agreement considered in isolation from all others.

We reject this line of reasoning. A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such pri-

[3] The Court of Appeals' controlling opinion is reported at 349 F. 2d 408. A prior opinion which was withdrawn is unofficially reported at 59 L. R. R. M. 2993.

vate contracts. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 550; cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578–579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.

There are two kinds of these jurisdictional disputes. Both are essentially disputes between two competing unions, not merely disputes between an employer and a single union. The ordinary jurisdictional dispute arises when two or more unions claim the right to perform a job which existed at the time their collective bargaining contracts with the employer were made. In such a situation it would be highly unlikely that each contract could be construed as giving each union the right to be paid for the single job. But the dispute before us now is not the ordinary jurisdictional dispute where each union claims the right to perform a job which existed at the time its collective bargaining agreement was made. Here, though two jobs existed when the collective bargaining agreements were made and though the railroad properly could contract with one union to perform one job and the other union to perform the other, automation has now resulted in there being only one job, a job which is different from either of the former two jobs and which was not expressly contracted to either of the unions. Although only one union can be assigned this

new job, it may be that the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such job elimination due to automation. But this does not mean that both unions can, under their separate agreements, have the right to perform the new job or that the Board, once the dispute has been submitted to it, can postpone determining which union has the right to the job in the future. By first ordering the railroad to pay one union and then later, in a separate proceeding, ordering it to pay the other union, without ever determining which union has the right to perform the job and thus without ever prejudicing the rights of the other union, the Board abdicates its duty to settle the entire dispute. Yet this is precisely the kind of merry-go-round situation which the petitioner claims is envisaged by the Act, a procedure which certainly does not "provide for the *prompt* and *orderly* settlement of *all* disputes . . . ," the purpose for which the Adjustment Board was established. § 2 (5). (Emphasis supplied.)

II.

The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature. And we have said in no uncertain language that the Adjustment Board has jurisdiction to do so. *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, was decided 20 years ago. That case concerned a dispute over which employees should be assigned to do certain railroad jobs—members of the conductors' union under their contract or members of the trainmen's union under their contract. In that case a district court, in charge of a railroad in bankruptcy, had entered a judgment in favor of the conductors. We reversed, holding that the Railway Labor Act vested exclusive power in the Adjustment Board to decide that controversy over

job assignments. It is true that we did not precisely decide there that the Board must bring before it all unions claiming the same jobs for their members, but we did say this:

> "We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. . . . *For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress." *Id.*, at 566–567. (Emphasis supplied.)

Four years after *Pitney* we decided *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. In that case a state court had interpreted collective bargaining contracts between a railroad and the same two unions here and had decided in favor of the clerks. We reversed, and, relying on *Pitney*, said:

> ". . . There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute *involving the railroad and two employee accredited bargaining agents* . . . .' Our ground for this holding was that the court 'should not have interpreted the contracts' but *should have left this question for determination*

by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S., at 567–568." *Id.*, at 243–244. (Emphasis supplied.)

We adhere to our holdings in *Pitney* and *Slocum* that the Adjustment Board does have exclusive jurisdiction to hear and determine disputes like this. See also *Order of Railway Conductors of America* v. *Southern R. Co.*, 339 U. S. 255. Petitioner argues that we are barred from this holding by *Whitehouse* v. *Illinois Cent. R. Co.*, 349 U. S. 366, decided after *Pitney* and *Slocum*. There is some language in *Whitehouse* which, given one interpretation, might justify an inference against the Adjustment Board's jurisdiction fully to decide this case in a single proceeding. But in the final analysis the *holding* in *Whitehouse* was only that the primary jurisdiction of the Adjustment Board could not be frustrated by a premature judicial action. Cf. *Carey* v. *Westinghouse Elec. Corp.*, 375 U. S. 261, 265–266. We decline to expand that case beyond its actual holding.

The Adjustment Board has jurisdiction, which petitioner admits, to hear and decide the controversy over the interpretation of the telegraphers' contract with the railroad as it relates to the work assignments. And § 3 First (j) provides that "the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." The clerks' union was given notice here as it should have been under § 3 First (j). Certainly it is "involved" in this dispute. Without its presence, unless it chooses to default and surrender its claims for its members, neither the Board nor the courts below could determine this whole dispute. As respondent contends, to decide, as the Board has here, that the telegraphers are entitled to be paid for these jobs creates another controversy for the railroad with the

clerks who have the jobs now. For should the Board's order be sustained, the railroad would not only have to make back payments to the telegraphers who have done no work but would be compelled to continue to pay two sets of workers—one set being idle. The Adjustment Board, as we said about the National Labor Relations Board in *Labor Board* v. *Radio & Television Broadcast Engineers,* 364 U. S. 573, 582–583, can, with its experience and common sense, handle this entire dispute in a satisfactory manner in a single proceeding.

We affirm the judgment of the Court of Appeals in holding that the clerks' union should be a party before the Board and the courts to this labor dispute over job assignments for its members. The cause should be remanded to the District Court with directions to remand this case to the Board.[4] The Board should be directed to give once again the clerks' union an opportunity to be heard, and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contract between the railroad and

[4] The Court of Appeals in affirming the dismissal of the telegraphers' union's petition for enforcement was quite correct in holding that the failure of the clerks to appear before the Board and of the Board to consider the contract between the clerks and the railroad could not be cured merely by joinder of the clerks' union in the District Court's enforcement proceeding. The Board had the exclusive jurisdiction to consider the clerks' contract and any claim they might have asserted under it. At the time, the Court of Appeals had no alternative but to affirm the dismissal by the District Court, for district courts could only "enforce or set aside" the Board's orders under § 3 First (p). They could not remand cases to the Board. This was changed on June 20, 1966, by Pub. L. No. 89–456, § 2 (e), 80 Stat. 209, which inserted a new provision, § 3 First (q), empowering district courts to remand proceedings to the Board. In view of the Board's failure to consider all of the issues and the clerks' understandable refusal to participate because of the then existing doubt as to whether they could be bound by the Board's decision, we conclude it appropriate to use this new availability of remand to the Board.

the telegraphers, but "in the light of . . . [contracts] between the railroad" and any other union "involved" in the overall dispute, and upon consideration of "evidence as to usage, practice and custom" pertinent to all these agreements. *Order of Railway Conductors* v. *Pitney*, *supra*, at 567. The Board's order, based upon such thorough consideration after giving the clerks' union a chance to be heard, will then be enforceable by the courts.

It is so ordered.

MR. JUSTICE STEWART, whom MR. JUSTICE BRENNAN joins, concurring.

Until now the Adjustment Board has dealt with the claim of the telegraphers as though it were totally unrelated to the claim of the clerks. To take this piecemeal approach to the underlying causes of this controversy not only invites inconsistent awards, but also ignores the industrial context in which the disputed contract was framed and implemented.

This case aptly illustrates why the Board cannot judge one-half of a problem while closing its eyes to the other half. The disputed provisions of the collective agreement were drawn before technological progress telescoped two work stations into one. The agreement did not explicitly provide for such a change. But it was designed to cover an extended period of time, and its language is sufficiently general to allow for flexibility in the light of changing circumstances.*

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*Among the rules of the Telegraphers' Agreement invoked in this dispute, the following are the most relevant:

ARTICLE 1—SCOPE.

Rule 1. This agreement will govern the wages and working conditions of agents, agent-telegraphers, agent-telephoners, telegraphers, telephoners, telegrapher-clerks, telephoner-clerks, telegrapher-car distributors, ticket clerk-telegraphers, telegrapher-switch-tenders, C. T. C. telegraphers, train and tower directors, towermen, lever-

To do justice to the parties in this situation the Board must take full measure of their circumstances. To justify the deference which the law has given to its deci-

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men, block operators, staffmen, managers, wire chiefs, repeater chiefs, chief operators, printer mechanicians, telephone operators (except switchboard operators), teletype operators, printer operators, agents non-telegraphers, and agents non-telephoners herein listed.

ARTICLE 2—POSITIONS AND RATES OF PAY.

Rule 5. General Telegraph Offices. (a) Positions and rates of pay in general telegraph offices under the jurisdiction of the Superintendent Telegraph shall be as follows:

. . . . .

4 Las Vegas "VG"	
Manager	2.127
2d chief operator-printer m[e]chn	1.995
3d chief operator-printer mechn	1.995
Telegrapher	1.851

. . . .

Rule 6. New Positions. The wages of new positions shall be in conformity with the wages of positions of similar kind or class in the seniority district where created.

ARTICLE 3—TIME ALLOWANCES.

Rule 10. Daily Guarantee. Regularly assigned employes will receive eight hours pay for each twenty-four hours, at rate of position occupied . . . .

. . . .

ARTICLE 6—SENIORITY.

Rule 47. Promotion. (a) Promotion shall be based on seniority and qualifications; qualifications being sufficient, seniority will prevail.

. . . . .

ARTICLE 8—GENERAL.

Rule 62. Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available, or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call.

. . . . .

Rule 70. Date Effective and Change. This agreement will be effective as of January 1, 1952, and shall continue in effect until it is changed as provided herein, or under the provisions of the Railway Labor Act.

sions, the Board must employ a decision-making technique that rests on fair procedure and industrial realities. By using a simple bilateral contract analysis the Board defaults in both of these duties. Cf. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 22–23, 26–27 (1958); Note, 75 Yale L. J. 877, 889–890 (1966).

Only by proceeding as the Court today directs can the Board properly decide cases of this kind. The provisions in the Railway Labor Act which state that the Board's orders are to be directed only against the carrier do not detract from the power of the Board to fulfill its tasks. For if the telegraphers and the clerks both advanced their claims and the Board directed the carrier to honor the claims of only one union, the other union would be bound just as though it had lost in a multilateral *in rem* proceeding. See 3 Freeman, The Law of Judgments §§ 1524–1526 (5th ed. 1925).

Since the Board has failed to use procedures which allow for an informed and fair understanding of the dispute between the petitioner and respondent, I concur in the opinion and judgment of the Court.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, dissenting.

This case involves a dispute between the telegraphers' union and a railroad as to whether the union's members, under its collective bargaining agreement with the carrier, were entitled to certain jobs (or compensatory payments in lieu thereof) which the carrier had unilaterally allotted to another union, the clerks. The telegraphers complained to the Railroad Adjustment Board. The Board held that, under the contract between the telegraphers and the railroad, the telegraphers' members had a right to the jobs, and it ordered the carrier to make compensatory payments to the senior telegrapher idled by its action.

The Court now holds that such an award will not be enforced because the clerks' union was not a party to the proceeding, and because the Board merely adjudicated the rights of the telegraphers and did not determine whether the clerks were entitled to the jobs instead. The Court's opinion states that the jobs in question must belong to one union or the other, and that it is the Board's duty to decide which of the two unions is entitled to the jobs.

I dissent. The Board acted as the statute commands. As I shall discuss, its power is limited to adjudications of grievances and contract disputes between a union and a railroad. It cannot compel conversion of a complaint proceeding between a union and a railroad into a three-party proceeding to "settle the entire dispute." Certainly the courts should not refuse to enforce its award because the Board has failed to do something which the statute does not require or empower it to do. I also emphatically submit that this Court should neither devise nor impose upon the Board or upon management and labor, the proposition, making its debut in this case in the field of railway labor law, that "only one union can be assigned this new job." There is nothing in the statute or precedents that permits or justifies this peremptory judicial foray into other people's business.

The basis of the Court's holding cannot be found in any provision of the Railway Labor Act. 44 Stat. 577 (1926), as amended, 45 U. S. C. §§ 151–188 (as amended by Act of June 20, 1966, 80 Stat. 208). The Court adverts to § 2 of the Act, which sets forth the purposes of the Railway Labor Act (including, of course, provisions relating to the National Mediation Board and provisions creating general duties and rights of carriers and employees—none of which defines the powers of the Adjustment Board). Section 2 sets forth a number of purposes, among which appears the phrase quoted in part by the Court: "(4) to provide for the prompt and orderly settle-

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ment of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." To the extent to which these provisions relate specifically to the purposes of the Adjustment Board, they do not define its powers. The Board's powers are specifically defined and limited in § 3 First (i) of the Act. The Court begs the question by giving to the phrase "settlement of all disputes" a meaning which disregards both the qualifying language of § 2 itself, and the specific enumeration of powers in § 3 First (i).

Ultimately, however, the Court appears to rest its decision not upon the Act, but upon a "principle" which it now creates. That proposition—unknown to railway labor law until this day—is that, whatever the parties' contract provides, the Board must observe and enforce the rule that "only one union can be assigned this new job." The Court holds that even if "the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such job elimination due to automation," the Board cannot conclude "that both unions can, under their separate agreements, have the right to perform the new job. . . ." It is because of this controlling principle that the Court asserts it was error for the Board to make an award unless the award would bind the clerks' union as well. Throughout its opinion the Court stresses that there is now but one "job" and that only one union's member can have "the right to the job." Obviously only one person can actually *do* the job; but the Board held only that a telegrapher was entitled to be *paid* for the job. In fact, the Court is—without articulating its premise—assuming that featherbedding is forbidden by natural law or

some other type of mandate that overrides contract, and that it is the Board's duty to enforce the prohibition. From this novel premise it derives its conclusion that the award was not enforceable.

There is no basis in the Railway Labor Act for either of the Court's propositions: that both unions must be parties to a proceeding initiated by one of them, or that the Board must "settle the entire dispute" by determining that one or the other (but not both) of the unions has title to the jobs. The Court's predilection for one job, one man may be sensible, but it may also be contrary to contract; and I know of no provision in the Constitution or statutes or decided cases that compels it. There is no basis for this Court to dictate—and that is what it is here doing—that a collective bargaining contract may not be enforced in accordance with its terms but must be subordinated to a one job, one man theory. This Court cannot and should not impose its own views. The anti-featherbedding principle may or may not be an admirable theory, depending upon one's preconceptions and point of view. It does not now exist in the railway labor field. And I respectfully suggest that this Court is in no position to assess the desirability of its judicial innovation. If featherbedding in the railroad industry is to be declared unlawful, it should not be this Court which does it. To say the least, the problems are too esoteric and too volatile to be the subject of judicial edict. They should be left to the parties and the legislature. Certainly, this Court should not invade the integrity of collective bargaining contracts to legislate the result it considers desirable or "orderly."

Only last Term this Court considered one of the peculiar institutions of railway labor, and sustained the validity of state "full-crew" statutes. These statutes, in direct contrast to the one job, one man principle

that the Court today assumes, have the effect sometimes of requiring railroads to hire one man, no job. The Court sustained these statutes against claims, among others, that Congress in the Railway Labor Act had pre-empted the field. *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966). Such a "sensitive and touchy problem" (*id.*, at 430), the Court wisely decided, was to be left to collective bargaining and the States in the absence of a clear congressional command. It is hard to comprehend the *Engineers* case if, as the Court now finds, the Railway Labor Act itself (presumably ever since its enactment in 1926) or other overriding law forbids what "full-crew" laws command. Certainly, the present problem, if it is a different one at all, is equally "sensitive and touchy," and the Court has yet to disclose the congressional authority dictating contrary treatment.

Prior decisions of this Court are of no assistance. The Court first refers to *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946). The Court candidly states that "we did not precisely decide there that the Board must bring before it all unions claiming the same jobs for their members . . . ." All that the Court decided in *Pitney* was that a dispute between two unions claiming a right to certain jobs had first to be determined by the Railroad Adjustment Board, and could not be decided initially by a bankruptcy court in reorganization proceedings. The passage from *Pitney* quoted by the Court merely states that the decision of the issue—the interpretation of the conductors' collective bargaining contract—had to be made in light of usage, practice and custom, and of other agreements between the railroad and the trainmen. Indeed, the quotation from *Pitney* recalls the basic principle that the Court here ignores: that in the "intricate and technical" field of railway labor relations, no court, including this Court, should displace

the agency which Congress has vested with authority—certainly not with the drastic imposition of a mandate to eliminate featherbedding.

It is, however, essential to note that there is absolutely no reason to believe that the Board failed to follow *Pitney* here. Both the majority and concurring opinions assume as fact that the Adjustment Board violated the duty declared in *Pitney* to construe the telegraphers' contract in light of the clerks' contract and railroad usage, practice and custom. Thus the majority characterizes the Board's proceedings in this case as one "in which only [the telegraphers'] . . . contract with the employer [was] . . . considered." The concurrence asserts that "Until now the Adjustment Board has dealt with the claim of the telegraphers as though it were totally unrelated to the claim of the clerks," and has used "a simple bilateral contract analysis" which prevented it from arriving at "an informed and fair understanding of the dispute between the petitioner and respondent." I am unable to find in the record before this Court any support for these suggestions that the Adjustment Board failed to perform its duty by refusing to consider the clerks' contract for its evidentiary value.[1]

The award of the Board makes clear that both practice and usage, and the possibly conflicting contractual claim

[1] The Court of Appeals' opinion asserts that the Board's rules of evidence excluded other contracts, and that the Board dealt with the case as if the clerks' contract did not exist. There is nothing in the record which suggests that at any time, in any way, the Board excluded references to the clerks' contract or treated it as irrelevant. If the Court of Appeals were correct as to the Board's rules, those rules would plainly be contrary to law and common-sense evidentiary principles. The railroad's submission to the Board, in demanding that notice be given the clerks' union (as it was), specifically invoked the clerks' contract, and stated that the relief sought by the telegraphers "would abrogate the agreement negotiated between the carrier and the Clerks' Organization . . . ."

of the clerks to the job in question, and the fact that clerks were currently performing the job, were considered by the Board. As to usage, the Board itself observed, with respect to a different aspect of its award, that "there is unanimity upon the proposition that where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement."

The Board's analysis of the substance of the dispute shows its central awareness of the clerks' claim to the jobs. The machines involved in this case are IBM teletype printers and receivers. They perform automatically the function of transmitting and receiving teletype messages between on-line railroad offices. The Board found that prior to the installation of these machines, telegraphers had exclusively performed this transmitting and receiving function as teletype operators and printer operators. However, apparently for its own convenience, since other machines in its IBM–complex were operated by clerks, the railroad unilaterally assigned the operation of the teletype printers and receivers to members of the clerks' union. The Board found that the work involved in operating the new machines had "been performed in the past by telegraphers and not by clerks."

Furthermore, even if the majority and concurring opinions were correct in stating that the Board failed to take the proper broad view of its function in construing the contract before it, the remedy, of course, would be to remand to the Board for a second proceeding to construe *this* contract. Instead, the Court remands for an entirely new proceeding to construe not only the contract brought before the Board in this case, but also the contract of a third party which has never invoked the Board's jurisdiction, which is not a party and which can be compelled to become a party only by this Court's

gloss on the statute, and in addition to apply in this new proceeding a novel substantive principle forbidding featherbedding.

Actually, the railroad's complaint is not that the Board refused to *consider* the clerks' contract, or relevant usage and practice. It is that the Board did not *decide* matters outside the issues submitted to it by the parties and the statute. And despite suggestions that *Pitney* was violated, the Court's real point—as it is respondent's—is that the Board should, in this proceeding between the telegraphers' union and the carrier, also *decide* the rights of the clerks' union—and should do so by awarding the jobs to one union or the other.

The Court also refers to *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950). This case is of no assistance whatever. The railroad filed an action in a state court for a declaratory judgment as to which of two unions was entitled under its contract with the railroad to have its members perform disputed jobs. Both unions were joined as defendants. This Court again held that the courts should not interpret the unions' contracts because this question is for determination by the Adjustment Board, "a congressionally designated agency peculiarly competent in this field." 339 U. S., at 244.

There is no doubt of the soundness of either *Pitney* or *Slocum*. The Railroad Adjustment Board does have exclusive, primary jurisdiction to determine contract disputes between a union and a carrier. And the Board must do so in light of "evidence as to usage, practice and custom" and of allegedly overlapping contracts with other unions. But the Board's authority is specific and limited. The Railway Labor Act narrowly defines the Adjustment Board's power. The Board [2] hears a dispute

[2] Actually, the Board functions in divisions, each responsible for a specified group of trades within the railroad world. § 3 First (h).

(a) "between an employee or group of employees and a carrier or carriers," (b) "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," (c) if the dispute is referred to it "by petition of the parties or by either party." It renders "awards," which are "final and binding upon both parties to the dispute." [3] That is the sum total of powers over disputes vested in the Railroad Adjustment Board.[4]

The Railroad Adjustment Board is quite a different agency from the National Labor Relations Board, from whose somewhat analogous role in other industries the Court appears to derive some comfort.[5] The NLRB has broad jurisdiction over "unfair labor practices." Section 10 (k) of the National Labor Relations Act (49 Stat. 453, as amended, 61 Stat. 146, 29 U. S. C. § 160 (k)) provides that whenever it is charged that any person has engaged in the unfair labor practice of a strike to enforce a union's demand in a jurisdictional controversy with another union, the NLRB is "empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have

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[3] Sections 3 First (i), (m) as amended by the Act of June 20, 1966 (80 Stat. 208). Prior to this amendment "money awards" were excluded from the scope of the quoted language.

[4] There are a few minor exceptions not relevant here. For example, the Board can interpret its own awards. § 3 First (m).

[5] In *Whitehouse* v. *Illinois Cent. R. Co.*, 349 U. S. 366 (1955), this Court cautioned against analogies drawn from other industries to railroad problems: "Both its history and the interests it governs show the Railway Labor Act to be unique. 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.' Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568–569." 349 U. S., at 371.

arisen." Under this section, this Court has in the past required the NLRB to take action of the kind which, in the present case, it for the first time requires of the Railroad Adjustment Board. The Court has held that the NLRB cannot obtain enforcement of a cease-and-desist order which determines only that the respondent union is not entitled to the work in dispute under its certification or collective bargaining agreement. The Court required that the Board go further and decide which of the two contending unions is entitled to the work and "then specifically to award such tasks in accordance with its decision." *Labor Board* v. *Radio Engineers,* 364 U. S. 573, 586 (1961).[6] The difficulty, however, is that § 10 (k) has no counterpart in the Railway Labor Act. No such power exists in the Railroad Adjustment Board, nor does the statute impose any comparable duty upon it.

The Board is essentially a permanent bilateral arbitration institution created by statute for settling disputes arising in the context of an established contractual relationship.[7] Its nature is illustrated by the provisions of the Act relating to awards made by the Board. These are couched in terms which assume a grievance or claim asserted by an employee or a union against a carrier. The

[6] But cf. *Carey* v. *Westinghouse Corp.,* 375 U. S. 261 (1964), in which the Court held that a union could obtain a court order to compel arbitration of a similar type of dispute, under an arbitration provision of a collective bargaining agreement between itself and the employer, despite the fact that the arbitration proceeding would not bind the other contending union.

[7] The Board has no jurisdiction over so-called "major" disputes which are outside the collective bargaining contract framework—for example, a dispute as to whether the contract should be changed. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722–728 (1945), adhered to on rehearing, 327 U. S. 661 (1946). To the extent that resolution of such disputes is subjected to a legal structure, it is the National Mediation Board, not the Railroad Adjustment Board, which is the responsible federal agency under the Railway Labor Act.

provisions refer only to carriers, not to other unions. For example, § 3 First (o) states that "In case of an award . . . in favor of petitioner . . . the Board shall make an order, directed to *the carrier*, to make the award effective . . . ." (Italics added.) The only provision in the Act for enforcement of awards is cast in terms of the carrier: "If a *carrier* does not comply with an order . . . ." § 3 First (p). (Italics added.) Nowhere in the Act is there a syllable which would indicate the intention that the Board is empowered to make awards as between the claims of contending unions. The Act is as clear as can be that the Adjustment Board's function is to act in disputes between a carrier and a union or employee, to adjudicate grievances of employees or their organizations against the carriers, and to pass upon controversies as to the meaning of the collective bargaining agreement between a carrier and a union.[8] The Board is not comparable in scope, function, capability or authority to the National Labor Relations Board.[9] It has no authority over "unfair labor practices" in general. It has no power comparable to that given the NLRB by

[8] The Board, with its peculiar bipartisan, private composition, §§ 3 First (a)–(h), is perhaps suited to this task, but one might question whether it would be appropriate for a larger role. For instance, since each division of the Board is composed of an equal number of railroad union and carrier representatives, and makes awards by majority vote, if the union representatives on the division were split—if, for example, either union had a representative on the division who disagreed with the other union representatives on the merits of the dispute—the carrier representatives would then have controlling voting power and could in effect allocate the work to whichever union they chose.

[9] The two Boards are utterly different. Some of the differences are adverted to in the text, and others are suggested by nn. 7 and 8, *supra*. The essential difference is between a permanent institutionalized arbitrator for settling disputes arising from a contractual relationship, and an administrative agency established to implement various defined public policies specified by Congress.

§ 10 (k) of the National Labor Relations Act to "hear and determine" jurisdictional disputes; it may make a decision affecting a jurisdictional dispute, but only if it comes to the Board in the limited and constricted form of a dispute between a union and a carrier as to the meaning and application of their agreement.

The Act does not give the Board power to compel a union which is affected by a contract dispute between another union and a carrier to participate in or be bound by the proceeding. This is "[o]ne thing [that] is unquestioned" according to the opinion of this Court in *Whitehouse* v. *Illinois Cent. R. Co.*, 349 U. S. 366, 372 (1955).[10] In that case, a dispute had arisen between the telegraphers and the respondent railroad because the railroad employed members of the clerks' union for jobs which the telegraphers claimed should have been allotted to its members under its collective bargaining agreement with the railroad. In due course, the telegraphers submitted the dispute to the Railroad Adjustment Board. Before a decision was announced by the Board, the railroad brought an action in the United States District Court to compel the Board to notify the clerks, asserting that otherwise the railroad might have to face a similar claim from the clerks. This Court held that the action was premature; but it pointed out that "One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding." 349 U. S., at 372. It said, flatly, that "The Board has jurisdiction over the only necessary parties to the proceeding [*i. e.*, the telegraphers' union] and over the subject matter." *Id.*, at 373. In substance, the Court in the present case repudiates *Whitehouse* for

[10] I suppose that if this Court says that the Board has power to subject another union to the proceedings, that would end the matter. But the effectiveness of our *ipse dixit* would not justify it.

reasons, not of law, but of assumed practical administrative symmetry and its own conceptions as to what is fair in a complex industrial situation. Labor relations are not susceptible of reduction to such simplicities; and with all deference this Court should fear to tread this path.

This is much more than a procedural matter. It is even more than whether the clerks can be subjected to a proceeding to which they assert they are strangers and to which Congress did not intend that they be subjected. The Court today rules that whatever the collective bargaining agreements provide—regardless of their provisions, and of the understanding of the parties—the Board must award the disputed work to one union or the other, and that it cannot provide a remedy to members of both, even if their contracts should so demand.

This may sound eminently reasonable at first hearing. But it may be both unfair and highly disruptive. Certainly, there is not a line, a word, in the Railway Labor Act which supports it. Let us suppose, for example, in the present situation that each IBM machine required one operator, and that the machine and the one operator performed both clerical and telegraphic services, displacing a telegrapher and a clerk. I know of absolutely no warrant for the Court's statement that the Board must "settle the entire dispute" by determining "which union has the right to the job" even if "both unions . . . under their separate agreements, have the right to perform the new job. . . ." On the contrary, regardless of what the clerks' contract provides,[11] if the telegraphers' contract also establishes *their* right to the job—which is entirely conceivable—the telegraphers are entitled to compensation. It is entirely possible that since the Board, as I

[11] Of course, the clerks' contract may be relevant to construction of the telegraphers' contract, under the *Pitney* case.

have discussed, is limited to construing and applying the agreements between each union and the carrier, it may indeed find that it has to require payment to members of one union for jobs actually performed by members of the other union. In that event, a sensible remedy would have to await negotiation between the union or unions and the carrier to eliminate the overlap and featherbedding.[12] But I repeat—the Board's task is to construe and apply the agreements, not to rewrite them, even to eliminate overlaps and duplications; nor is it the function of this Court to add new powers to those vested in the Board by Congress, or to impose upon the intricate and technical contracts of railway labor a new and unauthorized substantive principle.

I would reverse and remand for further proceedings in the District Court, consistent with the views expressed herein, with respect to the telegraphers' prayer for enforcement of the Board's award.

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[12] Under the Railway Labor Act, such contractual renegotiation would be a "major" dispute, subject to the jurisdiction of the Mediation Board, not the Adjustment Board. See n. 7, *supra*. See also *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960), where the Court upheld the telegraphers' right to strike to compel bargaining on a proposed contract change which would have prevented the railroad from abolishing any position in existence before a certain date. The Court held this was a "major dispute" covering a legitimate subject of collective bargaining within the contemplation of the Railway Labor Act, and therefore within the anti-injunction provisions of §§ 4, 8 and 13 (c) of the Norris-LaGuardia Act, 47 Stat. 70, 72, 73 (1932), 29 U. S. C. §§ 104, 108, 113 (c). It rejected the railroad's argument that the union's demand did not create a legitimate "labor dispute" within Norris-LaGuardia because it sought to perpetuate "wasteful" and "unnecessary" jobs.

CANADA PACKERS, LTD. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 11. Argued November 8–9, 1966.—Decided December 5, 1966.

Where a domestic railroad enters into a joint through international rate covering transportation from the United States to Canada, the Interstate Commerce Commission has jurisdiction in a reparations proceeding to determine the reasonableness of the joint through rate and to order the carrier performing the domestic service to pay reparations in the entire amount by which that rate is unreasonable. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, followed.

342 F. 2d 563, reversed.

Charles B. Myers argued the cause and filed briefs for petitioner.

Harvey Huston argued the cause and filed a brief for respondents.

Louis F. Claiborne, by special leave of Court, argued the cause for the United States, as *amicus curiae.* On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner* and *Robert B. Hummel. Leonard S. Goodman* argued the cause for the Interstate Commerce Commission, as *amicus curiae,* urging reversal. With him on the brief was *Robert W. Ginnane.*

PER CURIAM.

This case concerns the power of the Interstate Commerce Commission in reparations proceedings to determine the reasonableness of a joint through international freight rate. The American railroad respondents and their connecting carriers delivered 131 cars of potash from Carlsbad and Loving, New Mexico, to petitioner's

plants in Canada. Petitioner was charged and it paid a joint through international rate which it later attacked as unreasonable in a reparations proceeding before the Commission. Finding the rate to be unreasonable, the Commission ordered reparations in the amount of the difference between the rate charged and the rate which would have been reasonable at the time. Respondents refused to pay part of this amount on the theory that it represented an alleged overcharge for the Canadian leg of the trip over which the Commission had no jurisdiction under the applicable statute. This action followed in the District Court to collect the unpaid amount. The District Court found for the petitioner, the Court of Appeals reversed, 342 F. 2d 563, and we granted certiorari, 383 U. S. 906.

The provisions of the Interstate Commerce Act apply not only to transportation within the United States but to transportation from or to any place in the United States to or from a foreign country "but only insofar as such transportation . . . takes place within the United States." 24 Stat. 379, as amended, 49 U. S. C. § 1 (1). The Court of Appeals held that the Commission in this case was without jurisdiction to determine the reasonableness of freight rates for transportation taking place in Canada and hence was without power to order reparations with respect to the Canadian portion of the trip. The respondents and the United States, the latter differing with the Commission in this case, take a similar view. As an original matter there might well be considerable merit in this position. But the contrary view of the Commission is one of long standing, see *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I. C. C. 588 (1910), and *Citizens Gas & Coke Utility* v. *Canadian Nat. Rys.*, 325 I. C. C. 527 (1965), and one which this Court has upheld on more than one occasion. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, squarely held that where a carrier performing

transportation within the United States enters into a joint through international rate covering transportation in the United States and abroad, the Commission does have jurisdiction to determine the reasonableness of the joint through rate and to order the carrier performing the domestic service to pay reparations in the amount by which that rate is unreasonable. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, and *Great Northern R. Co.* v. *Sullivan*, 294 U. S. 458, are in accord. The Court of Appeals and respondents would distinguish these cases, but we think the differences relied on are insubstantial. Indeed, the United States quite candidly requests that we reconsider these older cases and so narrow the powers of the Commission with respect to joint through international rates. It is not shown, however, that the long-standing construction of the statute by both the Commission and this Court has produced any particularly unfortunate consequences and Congress, which could easily change the rule, has not yet seen fit to intervene. In these circumstances, we shall not disturb the construction previously given the statute by this Court, and the decision of the Court of Appeals must be

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

An Act of Congress gives the Interstate Commerce Commission jurisdiction over transportation from or to any place in the United States to or from a foreign country "but only insofar as such transportation . . . takes place within the United States." 24 Stat. 379, as amended, 49 U. S. C. § 1 (1). How that can be read, "Whether or not such transportation . . . takes place within the United States" remains a mystery. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, actually decided something less.

In *News Syndicate* there was a through rate from a point in Canada to New York City; but the carrier had failed to establish a rate from the international border to New York City. The Court refused to let the jurisdiction of the Commission be defeated in that way and allowed it to determine the reasonableness of the through rate. 275 U. S., at 187. In the *Lewis-Simas-Jones* case the Court also emphasized that no tariff applicable "to the American part of the transportation of an international shipment on a through bill of lading" had been established "as required by the Act." 283 U. S., at 663. Those cases were explained in *Great Northern R. Co.* v. *Sullivan*, 294 U. S. 458, 462.

> "In each, shipments moved from an adjacent country into the United States on through rates made by joint action of the participating foreign and American carriers. The American carrier, having violated the Act by failure to file any tariff to cover its part of the transportation, collected freight charges found to be excessive and, as one of two or more joint tort-feasors, was held liable to the extent that the charges it exacted were in excess of what the commission ascertained to be just and reasonable. But here the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of 'joint' instead of the 'combination' through rates that they did establish."

In the present case rates from Carlsbad and Loving, New Mexico, to the Canadian border points had been established. 300 I. C. C. 87. The issues presented in *News Syndicate* and *Lewis-Simas-Jones* are therefore not offered here. *Stare decisis* is an important principle

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in dealing with statutory law,[1] though even so we have not always placed "on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70.[2] As we said in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 140–141:

> "There is no occasion here to regard the silence of Congress as more commanding than its own plainly

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[1] "The House of Lords no longer regards the reasoning in previous cases as sacrosanct. Witness its striking departure in *Public Trustee* v. *Inland Revenue Commissioners* [[1960] A. C. 398] and *Midland Silicones Ltd.* v. *Scruttons Ltd.* [[1962] A. C. 446]. Those cases show that the House will not treat as absolutely binding any line of reasoning in a previous case which was not necessary to the decision: but will regard itself as at liberty to depart from it if convinced that it was wrong." *Penn-Texas Corp.* v. *Murat Anstalt* [1964] 2 Q. B. 647, 661.

And see [1966] C. L. Y. 9921:

"The Lord Chancellor made the following statement on July 26, 1966, on behalf of himself and the Lords of Appeal in Ordinary:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

"This announcement is not intended to affect the use of precedent elsewhere than in this House."

See generally Cross, Stare Decisis in Contemporary England, 82 L. Q. Rev. 203 (1966).

[2] We have not been reluctant to reverse our own erroneous interpretation of an Act of Congress. See, *e. g.*, *Helvering* v. *Hallock*,

> and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act. . . . To find significance in Congressional nonaction under these circumstances is to find significance where there is none."

And see *Helvering* v. *Hallock*, 309 U. S. 106, 119–122. Compare *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 185. Nor do we have here a precedent "around which, by the accretion of time and the response of affairs, substantial interests have established themselves." *Helvering* v. *Hallock*, *supra*, at 119.

Moreover, we need not be slaves to a precedent by treating it as standing for more than it actually decided nor by subtly eroding it in sophisticated ways. See Radin, The Trail of the Calf, 32 Cornell L. Q. 137, 143 (1946). It is enough that we do not approve "of the doctrinal generalization which the previous court used" (*ibid.*) and confine the precedent to what it actually decided. Certainly we should not extend the range of a precedent beyond its generating reason, especially when another policy, here the plain words of an Act of Congress, will be impaired by doing so.

I would affirm this judgment.

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309 U. S. 106; *Nye* v. *United States*, 313 U. S. 33; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118; *Commissioner* v. *Estate of Church*, 335 U. S. 632; *James* v. *United States*, 366 U. S. 213; *Smith* v. *Evening News Assn.*, 371 U. S. 195; *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U. S. 542, 552; *Fay* v. *Noia*, 372 U. S. 391, 435.

WATKINS *v.* CONWAY.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 65. Argued November 9, 1966.—Decided December 5, 1966.

Appellant obtained a judgment against appellee in Florida, where the statute of limitations for domestic judgments is 20 years. Five years and one day later he sued on that judgment in Georgia but was barred in the trial court by a Georgia statute providing that suits on foreign judgments shall be brought "within five years after such judgments have been obtained" (a limitation period shorter than that for Georgia domestic judgments) despite his claim that the statute violated the Full Faith and Credit and Equal Protection Clauses of the Constitution. The Georgia Supreme Court affirmed. *Held:* Since the Georgia courts have construed the statute to bar suit on a foreign judgment only if the judgment cannot be revived in the State where it was obtained, all appellant need do is return to Florida, revive his judgment, and come back to Georgia and file suit within five years.

221 Ga. 374, 144 S. E. 2d 721, affirmed.

William G. Vance argued the cause for appellant. With him on the brief was *Emmet J. Bondurant II.*

Martin McFarland argued the cause and filed a brief for appellee.

PER CURIAM.

This litigation began when appellant Watkins brought a tort action against Conway in a circuit court of Florida. On October 5, 1955, that court rendered a $25,000 judgment for appellant. Five years and one day later, appellant sued upon this judgment in a superior court of Georgia. Appellee raised § 3–701 of the Georgia Code as a bar to the proceeding:

> "Suits upon foreign judgments.—All suits upon judgments obtained out of this State shall be brought within five years after such judgments shall have been obtained."

The Georgia trial court gave summary judgment for appellee. In so doing, it rejected appellant's contention that § 3–701, when read against the longer limitation period on domestic judgments set forth in Ga. Code §§ 110–1001, 110–1002 (1935), was inconsistent with the Full Faith and Credit and Equal Protection Clauses of the Federal Constitution. The Georgia Supreme Court affirmed, also rejecting appellant's constitutional challenge to § 3–701. 221 Ga. 374, 144 S. E. 2d 721 (1965). We noted probable jurisdiction under 28 U. S. C. § 1257 (2). 383 U. S. 941 (1966).

Although appellant lays his claim under two constitutional provisions, in reality his complaint is simply that Georgia has drawn an impermissible distinction between foreign and domestic judgments. He argues that the statute is understandable solely as a reflection of Georgia's desire to handicap out-of-state judgment creditors. If appellant's analysis of the purpose and effect of the statute were correct, we might well agree that it violates the Federal Constitution. For the decisions of this Court which appellee relies upon do not justify the discriminatory application of a statute of limitations to foreign actions.[1]

But the interpretation which the Georgia courts have given § 3–701 convinces us that appellant has misconstrued it. The statute bars suits on foreign judgments only if the plaintiff cannot revive his judgment in the State where it was originally obtained. For the relevant date in applying § 3–701 is not the date of the original judgment, but rather it is the date of the latest revival of the judgment. *Fagan* v. *Bently,* 32 Ga. 534 (1861); *Baty* v. *Holston,* 108 Ga. App. 359, 133 S. E. 2d 107 (1963). In the case at bar, for example, all appellant

[1] The case most directly in point, *M'Elmoyle* v. *Cohen,* 13 Pet. 312, upheld the Georgia statute with which we deal today. But the parties in that case did not argue the statute's shorter limitation

need do is return to Florida and revive his judgment.[2] He can then come back to Georgia within five years and file suit free of the limitations of § 3–701.

It can be seen, therefore, that the Georgia statute has not discriminated against the judgment from Florida. Instead, it has focused on the law of that State. If Florida had a statute of limitations of five years or less

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for foreign judgments as the ground of its invalidity. Instead, the issue presented to this Court concerned the power of the States to impose any statute of limitations upon foreign judgments. See argument for plaintiff, 13 Pet., at 313–320. The language of Mr. Justice Wayne's opinion—"may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state, and for those of its own tribunals," 13 Pet., at 328—must be read against this argument. And, of course, that opinion cannot stand against an equal-protection claim, since it was written nearly 30 years before the Fourteenth Amendment was adopted.

Neither of the cases cited by the Georgia Supreme Court dictates the result of this case. The first, *Metcalf* v. *Watertown*, 153 U. S. 671, involved a Wisconsin statute which provided a shorter limitation for foreign, as opposed to domestic, judgments. But the holding of the case was merely that this statute should be construed as placing the same limitation on the judgment of a federal court sitting in Wisconsin as would apply to a judgment of a Wisconsin state court. The other precedent cited by the court below, *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, dealt with an Iowa statute of limitations on judgments that placed the same limitation on orders of foreign and domestic courts.

[2] The Florida statute of limitations on domestic judgments is 20 years. Fla. Stat. Ann. § 95.11 (1) (1960). Thus, it appears that appellant still has ample time to revive his judgment and bring it back to Georgia. See *Massey* v. *Pineapple Orange Co.*, 87 Fla. 374, 100 So. 170 (1924); *Spurway* v. *Dyer*, 48 F. Supp. 255 (D. C. S. D. Fla. 1942). Moreover, appellant can obtain substituted service of process over appellee in his revival proceeding. Fla. Stat. Ann. § 48.01 (9) (1943).

The Florida procedure for reviving judgments is similar to that of Alabama—Ala. Code, Tit. 7, § 574 (1960)—which was held in *Baty* v. *Holston*, 108 Ga. App. 359, 133 S. E. 2d 107 (1963), to revive a foreign judgment under § 3–701.

on its own judgments, the appellant would not be able to recover here.[3] But this disability would flow from the conclusion of the Florida Legislature that suits on Florida judgments should be barred after that period.[4] Georgia's construction of § 3–701 would merely honor and give effect to that conclusion. Thus, full faith and credit is insured, rather than denied, the law of the judgment State. Similarly, there is no denial of equal protection in a scheme that relies upon the judgment State's view of the validity of its own judgments. Such a scheme hardly reflects invidious discrimination.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[3] Such a short statute of limitations for domestic judgments is by no means a matter of mere speculation. See 2 Freeman, The Law of Judgments § 1076 (5th ed. 1925).

[4] If the appellant held a judgment from a State which did not consider its judgments to become dormant, so that no revival proceeding could be brought, we would be faced with a different case. See *Frank* v. *Wolf*, 17 Ga. App. 468, 87 S. E. 697 (1916).

LONG *v.* DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 77. Argued November 9, 1966.—Decided December 5, 1966.

Petitioner, an Iowa state prisoner, sought habeas corpus in the state court, claiming, *inter alia*, denial of counsel at preliminary hearing. After a hearing at which petitioner had no counsel, the trial court found against him on the facts. Thereafter petitioner's motions for counsel and for a free transcript of the habeas corpus proceeding for use on appeal were denied by the trial court on the ground that habeas corpus is a civil action. The Iowa Supreme Court refused to review the trial court's denials of these motions. *Held:* The State must furnish the indigent petitioner with a copy of the transcript, which is readily available, since an indigent cannot be deprived of appellate review of an adverse decision in a post-conviction proceeding as adequate as that afforded prisoners who can purchase a transcript.

Reversed and remanded.

Ronald L. Carlson, by appointment of the Court, 383 U. S. 956, argued the cause and filed briefs for petitioner.

Don R. Bennett, Assistant Attorney General of Iowa, argued the cause for respondent. With him on the brief was *Lawrence F. Scalise*, Attorney General.

PER CURIAM.

Petitioner was convicted of larceny and sentenced on October 21, 1963, to a term not to exceed five years. This conviction was affirmed on appeal to the Supreme Court of Iowa (*State* v. *Long*, 256 Iowa 1304, 130 N. W. 2d 663 (1964)), and petitioner is currently serving his sentence in the state penitentiary. On January 13, 1965, petitioner sought a writ of habeas corpus in the District Court of Iowa, Lee County, and contended, *inter alia*,

that he had been denied counsel at the preliminary hearing and that he himself had been incompetent at the time. After an evidentiary hearing at which petitioner was not afforded the assistance of court-appointed counsel, the District Court found against petitioner on the facts of his claims.[1] Petitioner thereupon applied to the District Court for appointment of counsel and for a free transcript of the habeas corpus proceeding, for use on appeal. The District Court denied these motions on the following ground: "Habeas corpus being a civil action there is no provision in the law for the furnishing of a transcript without the payment of fee, or for the appointment of counsel." Petitioner sought certiorari to review this decision from the Supreme Court of Iowa. Certiorari was denied without opinion [2] by that court.[3] On peti-

[1] As to the claim of lack of counsel at the preliminary hearing, the State now concedes that petitioner was not in fact represented at that time (although the District Court found to the contrary). Petitioner alleged in his petition for habeas corpus that a guilty plea obtained at the preliminary hearing was introduced as an admission at his criminal trial. The State concedes that if this is true, petitioner "probably is entitled to relief in habeas corpus under *White* v. *Maryland,* 373 U. S. 59." The Attorney General of Iowa has ruled that *White* is applicable to preliminary hearings in Iowa because guilty pleas, if made at that time, may later be used as admissions of guilt. 1964 Opinions of the Attorney General of Iowa 160 (October 5, 1964).

[2] The court's order reads: "Petition for certiorari filed, considered, and denied. See in this connection, *Waldon* v. *District Court of Lee County, Iowa,* 130 N. W. 2d 728." The *Waldon* case held only that a State need not provide appointed counsel on appeal from the denial of habeas corpus; it does not so much as refer to the transcript problem, to which this Court limited the grant of certiorari in this case.

[3] Petitioner's notice of appeal to the Supreme Court of Iowa was timely and properly filed. His appeal is pending before that court, and disposition has been stayed until the outcome of this preliminary case.

tion for a writ of certiorari to the Supreme Court of Iowa, this Court granted the writ limited solely to the refusal to furnish petitioner, an indigent, with a transcript of the habeas corpus proceeding, for purpose of appeal.

The judgment below must be reversed. The State properly concedes that under our decisions in *Smith* v. *Bennett*, 365 U. S. 708 (1961), and *Lane* v. *Brown*, 372 U. S. 477 (1963), "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith* v. *Bennett, supra,* at 709. We specifically held in *Smith* that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration. And we held in *Lane* that the same rule applies to protect an indigent against a financial obstacle to the exercise of a state-created right to appeal from an adverse decision in a post-conviction proceeding.

In *Lane* v. *Brown, supra,* at 483, the Court reaffirmed the fundamental principle of *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956), that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." The Court in *Lane* went on to observe that *Smith* had established "that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings." 372 U. S., at 484. See also *Eskridge* v. *Washington State Board*, 357 U. S. 214 (1958); *Burns* v. *Ohio*, 360 U. S. 252 (1959); *Draper* v. *Washington*, 372 U. S. 487 (1963).

The State suggests that there may be alternative ways of preparing, for purposes of appeal, an account of the relevant proceeding at the trial level. Cf. *Draper* v. *Washington, supra.* In the present case, a transcript is

available and could easily have been furnished. We need not consider a possible situation where a transcript cannot reasonably be made available and adequate alternatives are made available by the State. Accordingly, the judgment below must be reversed and the cause remanded to the Supreme Court of Iowa for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WALKER *v.* SOUTHERN RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 89. Argued November 10, 1966.—Decided December 5, 1966.

Action by petitioner, employee, for money damages against railroad for wrongful discharge in violation of collective bargaining agreement subject to the Railway Labor Act *held* not barred by his failure to pursue administrative remedies available under the Act at time he brought suit. *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630, followed; *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, distinguished.

354 F. 2d 950, reversed and remanded.

J. Nat Hamrick argued the cause for petitioner. With him on the brief was *Fred D. Hamrick.*

Jerome Ackerman argued the cause and filed a brief for respondent.

PER CURIAM.

Under *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, decided in 1941, a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim. See also *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244; *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653. The question in this case is whether those decisions should be overruled in light of *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, decided in 1965.

Petitioner was a yard fireman in the employ of respondent, the railroad. He sued in a North Carolina court on a claim that respondent had unlawfully discharged him on May 29, 1957, in violation of its collective bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen. The action was removed by respondent to the Federal District Court by reason of diversity of citizenship. The District Court overruled respondent's challenge to its jurisdiction, citing *Moore, Slocum,* and *Koppal,* and entered a judgment for damages in petitioner's favor. 237 F. Supp. 278. The Court of Appeals for the Fourth Circuit reversed, holding that *Maddox,* decided after the entry of the District Court judgment, required that petitioner first exhaust his administrative remedies. 354 F. 2d 950. Since our opinion in *Maddox* expressly stated that "we do not mean to overrule [*Moore* v. *Illinois Central R. Co.*] within the field of the Railway Labor Act" but that "[c]onsideration of such action should properly await a case presented" under that Act, 379 U. S., at 657, n. 14, we granted certiorari, 384 U. S. 926. We reverse.

Maddox presented the question whether contract grievance procedures provided in a collective bargaining agreement subject to the Labor Management Relations Act, 1947, and culminating in binding arbitration might be sidestepped in favor of a lawsuit, in light of the federal policy reflected in the LMRA of favoring such agreed-upon contract grievance procedures as the preferred method for settling disputes. The action was brought in an Alabama state court by an employee of the Republic Steel Corporation for severance pay allegedly owed him under the terms of a collective bargaining agreement which contained such a grievance procedure. We held that contract grievance procedures voluntarily incorporated by the parties in collective bargaining agreements

subject to the LMRA, unless specified by the parties to be nonexclusive, must be exhausted before direct legal redress may be sought by the employee.

Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, "railroad employees who have grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim"; for example, "the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7½ years . . . ." H. R. Rep. No. 1114, 89th Cong., 1st Sess., at 3, 5; S. Rep. No. 1201, 89th Cong., 1st Sess., at 2. The Congress also found that "if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained." H. R. Rep., *supra*, at 15. S. Rep., *supra*, at 3.

In consequence, Congress enacted Public Law 89–456, 80 Stat. 208, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by *Moore, Slocum,*

and *Koppal*. The contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuades us that we should not overrule those decisions in his case.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I dissent because I believe this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, requires the explicit overruling of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, a case that has already been all but completely vitiated by subsequent decisions.

In *Moore*, a railroad trainman brought an action for damages based upon an alleged wrongful discharge without first exhausting administrative remedies. Federal jurisdiction was invoked on the ground of diversity; at that time an employment contract under the Railway Labor Act was thought to be governed, like ordinary contracts, by state law. The applicable law in that case—that of Mississippi—did not require exhaustion of remedies. The Court held that nothing in the Railway Labor Act required a contrary result.

The premise of the *Moore* decision, that state law was applicable to this type of labor contract, was removed in a series of decisions holding that labor contracts governed by the Labor Management Relations Act, 1947, and the Railway Labor Act are subject to federal substantive law, not state law. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; *International Assn. of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682. In *Maddox, supra*, the doctrine of exhaustion of remedies was declared by

this Court to be a part of this federal labor law: "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U. S., at 652. Strong policy arguments were adduced in *Maddox* to support this general rule. See 379 U. S., at 652–653; Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 647–652 (1956).

I can see no reason why this rule should be thought inapplicable to cases under the Railway Labor Act. Although the *Maddox* decision did not explicitly cover such cases, the single dissenting Justice recognized that the Court, ". . . while declining expressly to overrule . . . [*Moore* and its progeny] in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." 379 U. S., at 667. The only two courts of appeals to deal with the impact of *Maddox* on *Moore* have concurred in declaring that exhaustion of remedies is now required in the railway labor field. *Walker* v. *Southern R. Co.*, 354 F. 2d 950 (C. A. 4th Cir.); *Neal* v. *System Bd. of Adjustment*, 348 F. 2d 722 (C. A. 8th Cir.). A Pennsylvania appellate court has refused to permit a suit like this one in state court on the ground that since *Maddox*, "We cannot see how the *Moore* case is still effective to permit a recovery in a state court suit in this case." *Beebe* v. *Union R. Co.*, 205 Pa. Super. 146, 153, 208 A. 2d 16, 20. Other state courts have reached the same conclusion. *Buchanan* v. *St. Louis Southwestern R. Co.*, 400 S. W. 2d 362; *Caffery* v. *New York Central R. Co.*, 24 App. Div. 2d 1075, 265 N. Y. S. 2d 742.

The rule of exhaustion of contractual and administrative remedies is a salutary one in an area in which specialization is important and the expertise of certain arbitral

bodies is recognized. In *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 371, the Court noted that " 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.' Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568–569." It is true of course, as the Court observes, that in the Labor Managment Relations Act cases arbitration is imposed contractually while under the Railway Labor Act arbitration by the Adjustment Board is mandatory for all "minor" contractual disputes. If anything, this distinction weighs in favor of respecting Congress' determination that disputes as to proper practices under a railroad labor contract be settled—at least initially—through direct negotiation between the affected parties and, that failing, by Adjustment Board arbitration.

The Court's only rationale for refusing to take the step of formally overruling *Moore* at this time, a step to which current precedent, logic, and policy all so persuasively point, is that there has apparently been some dissatisfaction with the speed of the Board's procedures and with the statute's scope of appeal. This dissatisfaction is properly the subject of congressional concern. It is in my view, however, unsound for this Court to make the question whether exhaustion of remedies applies depend upon our decision as to how effectively we think the Board is functioning. It should be enough, as a unanimous Court said just last Term, that Congress ". . . invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise

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in this field." *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257, 261–262. The Court there stated: "This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Id.*, at 263.

We need not even go back to last Term for such an expression of confidence in the workings of the Railroad Adjustment Board as the central organ of Railway Labor Act contract interpretation. In today's decision in *Transportation-Communication Employees Union* v. *Union Pacific R. Co.*, *ante*, p. 157, the Court holds that the jurisdiction of the Board extends to settlement of tripartite work-assignment disputes. "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written," the Court says, "are entitled to have a fair, expeditious hearing to settle disputes of this nature." *Ante*, at 162. To meet arguments that the Board is not capable of dealing with such complex problems, the Court rightly notes that the Board can ". . . with its experience and common sense, handle this entire dispute in a satisfactory manner in a single proceeding." *Ante*, at 165.

I can see no reason why the Board, for purposes of the simple run-of-the-mill contract dispute raised in the present case, is suddenly deemed so incapable of adequately handling the question that the familiar labor law doctrine of exhaustion of remedies is ignored in this instance.

I would affirm the judgment of the Court of Appeals.

NEW ENGLAND MOTOR RATE BUREAU, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 591. Decided December 5, 1966.

254 F. Supp. 633, affirmed.

Peter T. Beardsley, R. Edwin Brady, Bryce Rea, Jr., Guy H. Postell, John W. McFadden, Harry C. Ames, Roland Rice, Homer S. Carpenter, John S. Fessenden and *Richard R. Sigmon* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al.

William Q. Keenan for Railway Express Agency, Inc., and *Arthur A. Arsham* for National Small Shipments Traffic Conference, Inc., et al., intervenors below.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

CADY ET AL. *v.* MISSOURI EX REL. STATE HIGHWAY COMMISSION OF MISSOURI.

APPEAL FROM THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

No. 613. Decided December 5, 1966.

400 S. W. 2d 481, appeal dismissed and certiorari denied.

Elwyn L. Cady, Jr., for appellants.

Robert L. Hyder and *Bruce A. Ring* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MINISTERS LIFE & CASUALTY UNION *v.* HAASE, COMMISSIONER OF INSURANCE, ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 634. Decided December 5, 1966.

30 Wis. 2d 339, 141 N. W. 2d 287, appeal dismissed.

Erwin N. Griswold for appellant.

Bronson C. La Follette, Attorney General of Wisconsin, and *E. Weston Wood,* Assistant Attorney General, for appellees.

Thomas C. Lynch, Attorney General, and *H. Warren Siegel,* Deputy Attorney General, for the State of California, as *amicus curiae,* in support of appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

LEWIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 36. Argued October 17, 1966.—Decided December 12, 1966.

An undercover federal narcotics agent, by misrepresenting his identity on the telephone, was twice invited to the home of petitioner for the purpose of executing unlawful narcotics transactions. Petitioner was thereafter indicted and convicted under 26 U. S. C. § 4742 (a). Rejecting petitioner's motion to suppress the purchased narcotics as illegally seized without a warrant, the trial court found petitioner guilty and the Court of Appeals affirmed. *Held:* The facts of this case present no violation of the Fourth Amendment. Pp. 208–212.

(a) The Government's use of decoys and undercover agents is not *per se* unlawful. Pp. 208–209.

(b) The petitioner invited the agent to his home for the very purpose of illegally selling him narcotics. *Gouled* v. *United States*, 255 U. S. 298 (1921), distinguished. Pp. 209–210.

(c) When the home is opened as a place of illegal business to which outsiders are invited for commercial purposes, the Fourth Amendment is not violated when a government agent enters pursuant to an invitation and then neither sees, hears nor takes anything either unrelated to the business purpose of his visit or not contemplated by the occupant. P. 211.

352 F. 2d 799, affirmed.

S. Myron Klarfeld argued the cause and filed a brief for petitioner.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin, Beatrice Rosenberg* and *Sidney M. Glazer.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question for resolution here is whether the Fourth Amendment was violated when a federal narcotics agent,

by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into petitioner's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at petitioner's criminal trial over his objection. We hold that under the facts of this case it was not. Those facts are not disputed and may be briefly stated as follows:

On December 3, 1964, Edward Cass, an undercover federal narcotics agent, telephoned petitioner's home to inquire about the possibility of purchasing marihuana. Cass, who previously had not met or dealt with petitioner, falsely identified himself as one "Jimmy the Pollack [*sic*]" and stated that a mutual friend had told him petitioner might be able to supply marihuana. In response, petitioner said, "Yes. I believe, Jimmy, I can take care of you," and then directed Cass to his home where, it was indicated, a sale of marihuana would occur. Cass drove to petitioner's home, knocked on the door, identified himself as "Jim," and was admitted. After discussing the possibility of regular future dealings at a discounted price, petitioner led Cass to a package located on the front porch of his home. Cass gave petitioner $50, took the package, and left the premises. The package contained five bags of marihuana.[1] On December 17, 1964, a similar transaction took place, beginning with a phone conversation in which Cass identified himself as "Jimmy the Pollack" and ending with an invited visit by Cass to petitioner's home where a second sale of marihuana occurred. Once again, Cass paid petitioner

[1] In the illegal narcotics trade, an average "bag" of marihuana contains approximately five grams of marihuana. The five bags transferred to the agent by petitioner, however, contained a quantity of marihuana measuring 31.16 grams.

$50, but this time he received in return a package containing six bags of marihuana.[2]

Petitioner was arrested on April 27, 1965, and charged by a two-count indictment with violations of the narcotics laws relating to transfers of marihuana. 26 U. S. C. § 4742 (a). A pretrial motion to suppress as evidence the marihuana and the conversations between petitioner and the agent was denied, and they were introduced at the trial. The District Court, sitting without a jury, convicted petitioner on both counts and imposed concurrent five-year penitentiary sentences. The Court of Appeals for the First Circuit affirmed, 352 F. 2d 799, and we granted certiorari, 382 U. S. 1024.

Petitioner does not argue that he was entrapped, as he could not on the facts of this case; [3] nor does he contend that a search of his home was made or that anything other than the purchased narcotics was taken away. His only contentions are that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception.

Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception.[4] Indeed, it has long been acknowl-

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[2] The six bags transferred in this second transaction contained 40.34 grams of marihuana.

[3] Compare *Sherman* v. *United States*, 356 U. S. 369 (1958), and *Sorrells* v. *United States*, 287 U. S. 435 (1932). See generally Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245 (1942).

[4] In oral argument before this Court, counsel for petitioner conceded that information obtained by the agent in the course of his

edged by the decisions of this Court, see *Grimm* v. *United States,* 156 U. S. 604, 610 (1895), and *Andrews* v. *United States,* 162 U. S. 420, 423 (1896),[5] that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents. The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual. See, *e. g., Massiah* v. *United States,* 377 U. S. 201 (1964); *Trupiano* v. *United States,* 334 U. S. 699 (1948).

Petitioner argues that the Government overstepped the constitutional bounds in this case and places principal reliance on *Gouled* v. *United States,* 255 U. S. 298 (1921). But a short statement of that case will demonstrate how misplaced his reliance is. There, a business acquaintance of the petitioner, acting under orders of federal officers, obtained entry into the petitioner's office by falsely representing that he intended only to pay a social visit. In the petitioner's absence, however, the

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general undercover investigation, together with the subject matter of the first telephone conversation between the agent and petitioner, provided probable cause for believing that a narcotics offense would be committed in petitioner's home and, therefore, would have supported the issuance of a search warrant. According to counsel, the agent's misrepresentations would not have vitiated a magistrate's determination of probable cause. Counsel further suggested that, if the agent had arrested petitioner at the latter's home and then had conducted a search incidental to the arrest, no constitutional problems would be presented.

[5] Former Chief Justice Hughes commented as follows upon the use of official deception in combating criminal activity:

"Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." *Sorrells* v. *United States,* 287 U. S. 435, 441–442 (1932).

intruder secretly ransacked the office and seized certain private papers of an incriminating nature. This Court had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently obtained invitation rather than by force or stealth.

In the instant case, on the other hand, the petitioner invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price. Indeed, in order to convince the agent that his patronage at petitioner's home was desired, petitioner told him that, if he became a regular customer there, he would in the future receive an extra bag of marihuana at no additional cost; and in fact petitioner did hand over an extra bag at a second sale which was consummated at the same place and in precisely the same manner. During neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business. Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.[6] A prime example is provided by the narcotics traffic.

[6] "Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of

The fact that the undercover agent entered petitioner's home does not compel a different conclusion. Without question, the home is accorded the full range of Fourth Amendment protections. See *Amos* v. *United States,* 255 U. S. 313 (1921); *Harris* v. *United States,* 331 U. S. 145, 151, n. 15 (1947). But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra,* is sufficient to dispose of that contention.

Finally, petitioner also relies on *Rios* v. *United States,* 364 U. S. 253 (1960); *Jones* v. *United States,* 362 U. S. 257 (1960); *McDonald* v. *United States,* 335 U. S. 451 (1948); and *Johnson* v. *United States,* 333 U. S. 10 (1948). But those cases all dealt with the exclusion of evidence that had been forcibly seized against the suspects' desires and without the authorization conferred by search warrants. A reading of them will readily demonstrate that they are inapposite to the facts of this case;

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illegal narcotics is a practical necessity. . . . Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not." Model Penal Code § 2.10, comment, p. 16 (Tent. Draft No. 9, 1959).

See also Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs, 60 Yale L. J. 1091, 1094 (1951); Note, 73 Harv. L. Rev. 1333, 1338–1339 (1960).

and, in this area, each case must be judged on its own particular facts. Nor is *Silverman* v. *United States*, 365 U. S. 505 (1961), in point; for there, the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house. The instant case involves no such problem; it has been well summarized by the Government at the conclusion of its brief as follows:

> "In short, this case involves the exercise of no governmental power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place. It presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana."

Further elaboration is not necessary. The judgment is

Affirmed.

[For opinion of DOUGLAS, J., dissenting, see *post*, p. 340.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE FORTAS joins, concurring.

While I concur in the Court's judgment, I vote to affirm solely on the reasoning on which the Court ulti-

mately relies, namely that petitioner's apartment was not an area protected by the Fourth Amendment as related to the transactions in the present case.

The Fourth Amendment protects against governmental intrusion upon "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States,* 116 U. S. 616, 630. However, the occupant can break the seal of sanctity and waive his right to privacy in the premises. Plainly he does this to the extent that he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. When his customer turns out to be a government agent, the seller cannot, then, complain that his privacy has been invaded so long as the agent does no more than buy his wares. Thus the corner grocery with the living quarters in the rear would not be protected with respect to the area set aside for the purchase of groceries, although the living quarters to which shoppers are not privy retain the constitutional immunity. Cf. *Wong Sun* v. *United States,* 371 U. S. 471.

The petitioner in this case opened his apartment for the conduct of a business, the sale of narcotics; the agent, in the same manner as any private person, entered the premises for the very purpose contemplated by the occupant and took nothing away except what would be taken away by any willing purchaser. There was therefore no intrusion upon the "sanctity" of petitioner's home or the "privacies of life."

IMMIGRATION AND NATURALIZATION SERVICE *v.* ERRICO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 54. Argued October 20, 1966.—Decided December 12, 1966.*

Section 241 (f) of the Immigration and Nationality Act, which exempts from deportation an alien who obtained a visa and entry to the United States by fraud and misrepresentation where the alien is the spouse, parent or child of an American citizen or of an alien lawfully admitted for permanent residence, and was "otherwise admissible at the time of entry," is construed, in the light of its humanitarian purpose of preventing the breaking up of families, to save from deportation such aliens who misrepresented their status for the purpose of evading quota restrictions. Pp. 217–225.

No. 54, 349 F. 2d 541, affirmed; No. 91, 350 F. 2d 279, reversed.

Solicitor General Marshall argued the cause for petitioner in No. 54 and for respondent in No. 91. With him on the briefs were *Assistant Attorney General Vinson, Louis F. Claiborne, L. Paul Winings* and *Charles Gordon.*

Frank Ierulli argued the cause for respondent in No. 54. With him on the brief was *Edwin J. Peterson.*

Julius C. Biervliet argued the cause for petitioner in No. 91. With him on the brief was *Edward Q. Carr, Jr.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

We granted certiorari in these cases to resolve a conflict between the Second and Ninth Circuits on their interpretations of § 241 (f) of the Immigration and

*Together with No. 91, *Scott, aka Plummer* v. *Immigration and Naturalization Service,* on certiorari to the United States Court of Appeals for the Second Circuit.

Nationality Act.[1] The issue is identical in both cases and, therefore, lends itself to a single opinion.

Section 241 (f) reads as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

The issue is whether the statute saves from deportation an alien who misrepresents his status for the purpose of evading quota restrictions, if he has the necessary familial relationship to a United States citizen or lawful permanent resident.

Respondent Errico in No. 54, a native of Italy, falsely represented to the immigration authorities that he was a skilled mechanic with specialized experience in repairing foreign automobiles. On the basis of that misrepresentation he was granted first preference quota status under the statutory preference scheme then in effect, and entered the United States in 1959 with his wife. A child was born to the couple in 1960 and acquired United States citizenship at birth. In 1963 deportation proceedings were commenced against Errico on the ground that he was excludable at the time of entry as not "of the proper status under the quota specified in the immigrant visa." [2]

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[1] 75 Stat. 655 (1961), 8 U. S. C. § 1251 (f).

[2] Section 211 (a)(4) of the Immigration and Nationality Act, 66 Stat. 181 (1952), later amended, 79 Stat. 917 (1965), 8 U. S. C. § 1181 (a) (1964 ed., Supp. I). Aliens who were excludable at the time of entry under the law then existing are deportable under § 241 (a)(1), 66 Stat. 204 (1952), as amended, 8 U. S. C. § 1251 (a)(1).

Throughout the proceedings Errico insisted that he was saved from deportation by § 241 (f). The special inquiry officer of the Immigration and Naturalization Service ruled that relief under § 241 (f) was not available because Errico had not complied with quota requirements and, hence, was not "otherwise admissible at the time of entry." The Board of Immigration Appeals affirmed the deportation order but the Court of Appeals for the Ninth Circuit reversed, holding that the construction of the statute adopted by the Board would strip it of practically all meaning, since a material misrepresentation would presumably be given to conceal some factor that would bear on admissibility. 349 F. 2d 541. We granted certiorari. 383 U. S. 941.

Petitioner Scott in No. 91, a native of Jamaica, contracted a marriage with a United States citizen by proxy solely for the purpose of obtaining nonquota status for entry into the country. She has never lived with her husband and never intended to do so. After entering the United States in 1958, she gave birth to an illegitimate child, who became an American citizen at birth. When the fraud was discovered, deportation proceedings were begun, and a special inquiry officer of the Immigration and Naturalization Service found her deportable on the ground that she was not a nonquota immigrant as specified in her visa.[3] The Board of Immigration Appeals affirmed, and the Court of Appeals for the Second Circuit affirmed the Board. 350 F. 2d 279. The court agreed with the Board of Immigration Appeals that a sham marriage contracted solely to circumvent the immigration laws would not confer nonquota status on an alien as the spouse of an American citizen. It also affirmed the ruling that Mrs. Scott was not entitled to relief under § 241 (f) because she was not otherwise admissible

[3] Section 211 (a)(3), 66 Stat. 181 (1952), later amended, 79 Stat. 917 (1965), 8 U. S. C. § 1181 (a) (1964 ed., Supp. I).

at the time of entry, since her country's quota was oversubscribed. We granted certiorari. 383 U. S. 941.

At the outset it should be noted that even the Government agrees that § 241 (f) cannot be applied with strict literalness. Literally, § 241 (f) applies only when the alien is charged with entering in violation of § 212 (a)(19) of the statute, which excludes from entry "[a]ny alien who . . . has procured a visa or other documentation . . . by fraud, or by willfully misrepresenting a material fact." [4] Under this interpretation, an alien who entered by fraud could be deported for having entered with a defective visa or for other documentary irregularities even if he would have been admissible if he had not committed the fraud. The Government concedes that such an interpretation would be inconsistent with the manifest purpose of the section, and the administrative authorities have consistently held that § 241 (f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was "otherwise admissible at the time of entry." [5] The Government's argument in both cases is that to be otherwise admissible at the time of entry the alien must show that he would have been admitted even if he had not lied, and that the aliens in these cases would not have been admitted because of the quota restrictions. It is the argument of the aliens that our adoption of the government thesis would negate the intention of Congress to apply fair humanitarian standards in granting relief from the consequences of their fraud to aliens who are close relatives of United States citizens, and that the statute would have practically no effect if construed as the Government argues, since it

[4] 66 Stat. 183 (1952), as amended, 8 U. S. C. § 1182 (a)(19).

[5] See *Matter of S—*, 7 I. & N. Dec. 715 (1958); *Matter of Y—*, 8 I. & N. Dec. 143 (1959).

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requires a considerable stretch of the imagination to conceive of an alien making a material misrepresentation that did not conceal some factor that would make him inadmissible.

The sharp divergence of opinion among the circuit judges in these cases indicates that the meaning of the words "otherwise admissible" is not obvious. An interpretation of these words requires close attention to the language of § 241 (f), to the language of its predecessor, § 7 of the 1957 Act,[6] and to the legislative history of these provisions.

The legislative history begins with the enactment of the Displaced Persons Act of 1948, 62 Stat. 1009. This Act provided for the admission to the United States of thousands of war refugees, many from countries that had fallen behind the Iron Curtain. Some of these refugees misrepresented their nationality or homeland while in Europe to avoid being repatriated to a Communist country. In so doing, however, they fell afoul of § 10 of the Act, which provided that persons making willful misrepresentations for the purpose of gaining admission "shall thereafter not be admissible into the United States." The plight of these refugees, who were excluded from the United States for misrepresentations that were generally felt to be justifiable, inspired recurring proposals for statutory reform. When the Act was revised and codified in 1952, the House Committee recommended adding a provision to save such refugees from deportation when they had misrepresented their nationality or homeland only to avoid repatriation and persecution.[7] The Conference Committee deleted the provision, but announced its sympathy with the refugees in the following terms:

> "It is also the opinion of the conferees that the sections of the bill which provide for the exclusion

[6] Pub. L. 85-316, 71 Stat. 639 (1957).

[7] See H. R. Rep. No. 1365, 82d Cong., 2d Sess., p. 128 (1952).

> of aliens who obtained travel documents by fraud or by willfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth when applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence. The conferees wish to emphasize that in applying fair humanitarian standards in the administrative adjudication of such cases, every effort is to be made to prevent the evasion of law by fraud and to protect the interest of the United States." H. R. Rep. No. 2096, 82d Cong., 2d Sess., p. 128 (1952).

The Immigration and Naturalization Service and the Attorney General did not construe the statute as the Conference Committee had recommended, believing that the explicit statutory language did not allow for an exemption for justifiable misrepresentations. Refugees who misrepresented their place of origin were always found to have concealed a material fact, since the misrepresentation hindered an investigation of their background.[8]

The misrepresentation section was not the only provision of the 1952 legislation that was widely thought to be unnecessarily harsh and restrictive, and in 1957 Congress passed legislation alleviating in many respects the stricter provisions of the earlier legislation. The purpose of the 1957 Act is perfectly clear from its terms, as well as from the relevant House and Senate Com-

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[8] See *Matter of B— and P—*, 2 I. & N. Dec. 638 (1947); H. R. Rep. No. 1199, 85th Cong., 1st Sess., p. 10 (1957).

mittee Reports.[9] The most important provisions of the Act provide for special nonquota status for the adopted children or illegitimate children of immigrant parents, and for orphans who have been or are to be adopted by United States citizens. Other important provisions allow the Attorney General to waive certain grounds for exclusion or deportation, including affliction with tuberculosis or conviction of a crime involving moral turpitude, on behalf of aliens who are near relatives of United States citizens or of aliens lawfully admitted for permanent residence. The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.[10]

In this context it is not surprising that Congress also granted relief to aliens facing exclusion or deportation

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[9] "The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H. R. Rep. No. 1199, 85th Cong., 1st Sess., p. 7 (1957). See also S. Rep. No. 1057, 85th Cong., 1st Sess. (1957).

[10] It is in this context that the legislative history cited in the dissent should be understood. The remarks of Senator Eastland and Congressman Celler quoted in footnote 4 of the dissent in context do not refer to § 7 of the Act but to the provisions of the bill providing for the adoption of alien orphans. Furthermore, Senator Eastland and Congressman Celler did not mean that no exceptions to the quota requirements were intended to be created, because the basic purpose of the bill was to relax the quota system for adopted children and for certain other classes of aliens deemed deserving of relief. They were reassuring their colleagues that no fundamental changes in the quota system were contemplated.

because they had gained entry through misrepresentation. Section 7 of the 1957 Act provided that:

> "The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided,* That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. After the effective date of this Act, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of

> perjury in connection therewith, shall hereafter be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States."

This section waived deportation under certain circumstances for two classes of aliens who had entered by fraud or misrepresentation. First, an alien who was "the spouse, parent, or a child of a United States citizen . . ." was saved from deportation for his fraud if he was "otherwise admissible at the time of entry." Second, an alien who entered during the postwar period and misrepresented his nationality, place of birth, identity, or residence was saved from deportation if he was "otherwise admissible at the time of entry" *and* if he could

> "establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere."

This language would be meaningless if an alien who committed fraud for the purpose of evading quota restrictions would be deportable as not "otherwise admissible at the time of entry." Congress must have felt that aliens who evaded quota restrictions by fraud would be "otherwise admissible at the time of entry" or it would not have found it necessary to provide further that, in the case of an alien *not* possessing a close familial relationship to a United States citizen or lawful per-

manent resident, the fraud must not be for the purpose of evading quota restrictions.

This conclusion is reinforced by the fact that Congress further specified that the aliens who were not close relatives of United States citizens must establish that their fraud was not committed for the purpose of evading an investigation. Fraud for the purpose of evading an investigation, if forgiven by the statute, would clearly leave the alien "otherwise admissible" if there were no other disqualifying factor. Elementary principles of statutory construction lead to the conclusion that Congress meant to specify two specific types of fraud that would leave an alien "otherwise admissible" but that would nonetheless bar relief to those aliens who could not claim close relationship with a United States citizen or alien lawfully admitted for permanent residence.

The present § 241 (f) is essentially a re-enactment of § 7 of the 1957 Act. The legislative history leaves no doubt that no substantive change in the section was intended.[11] The provision dealing with aliens who had entered the United States between 1945 and 1954, and had misrepresented their nationality for fear of persecution or repatriation, was omitted because it had accomplished its purpose; the rest of the section was retained intact.[12] It could hardly be argued that Congress intended to change the construction of the statute by this codification.

The intent of § 7 of the 1957 Act not to require that aliens who are close relatives of United States citizens have complied with quota restrictions to escape deportation for their fraud is clear from its language, and there is nothing in the legislative history to suggest that Congress had in mind a contrary result. The only specific

[11] H. R. Rep. No. 1086, 87th Cong., 1st Sess., p. 37 (1961). See also 107 Cong. Rec. 19653–19654 (1961) (remarks of Senator Eastland).

[12] H. R. Rep. No. 1086, 87th Cong., 1st Sess., p. 37 (1961).

reference to the part of § 7 that deals with close relatives of United States citizens or residents is in the House Committee Report, and it says only that most of the persons eligible for relief would be

> "Mexican nationals, who, during the time when border-control operations suffered from regrettable laxity, were able to enter the United States, establish a family in this country, and were subsequently found to reside in the United States illegally." H. R. Rep. No. 1199, 85th Cong., 1st Sess., p. 11.

Without doubt most of the aliens who had obtained entry into the United States by illegal means were Mexicans, because it has always been far easier to avoid border restrictions when entering from Mexico than when entering from countries that do not have a common land border with the United States. There is nothing in the Committee Report to indicate that relief under the section was intended to be restricted to Mexicans, however. Neither does it follow that, because Mexicans are not subject to quota restrictions, therefore nationals of countries that do have a quota must be within the quota to obtain relief.

The construction of the statute that we adopt in these cases is further reinforced when the section is regarded in the context of the 1957 Act. The fundamental purpose of this legislation was to unite families. Refugees from Communist lands were also benefited, but the Act principally granted relief to persons who would be temporarily or permanently separated from their nearest relatives if the strict requirements of the Immigration and Nationality Act, including the national quotas, were not relaxed for them. It was wholly consistent with this purpose for Congress to provide that immigrants who gained admission by misrepresentation, perhaps many years ago, should not be deported because their countries' quotas were oversubscribed when they entered if the

effect of deportation would be to separate families composed in part of American citizens or lawful permanent residents.

Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U. S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

See also *Barber* v. *Gonzales*, 347 U. S. 637, 642–643. The 1957 Act was not a punitive statute, and § 7 of that Act, now codified as § 241 (f), in particular was designed to accomplish a humanitarian result. We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens, and that the *Errico* decision must be affirmed and the *Scott* decision reversed.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting.

The facts in one of these cases (No. 91) vividly illustrate the effect of the Court's interpretation of § 241 (f)

of the Immigration and Nationality Act. The petitioner, a resident of Jamaica, paid for a sham marriage with an American citizen. A ceremony was held, but the petitioner and her "husband" parted immediately and have not seen each other since. However, the pretended marriage served its purpose; the petitioner was admitted into this country as a nonquota immigrant upon her false representation that she was the wife of a United States citizen. After this fraudulent entry she managed to become the actual parent of a United States citizen by conceiving and bearing an illegitimate child here.

The Court holds that this unsavory series of events gives the petitioner an unqualified right under § 241 (f) to remain in this country ahead of all the honest people waiting in Jamaica and elsewhere to gain lawful entry.[1] I can find no support in the statute for such an odd and inequitable result.

Section 241 (f) provides as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

It seems clear to me, for two separate and independently sufficient reasons, that this statute does not operate to bar the deportation of the aliens in the cases now

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[1] When "Mrs. Scott" made her fraudulent entry in 1958, Jamaica had an annual quota of 100 immigrants and a waiting list of 21,759 hopeful applicants. The corresponding figures for Italy in 1959, the year of Mr. Errico's entry, were 5,666 and 162,612.

before us. In the first place, § 241 (f) has application only to the deportation provisions which are based upon fraudulent entry, and the aliens in these two cases were not ordered to be deported under those provisions. Secondly, even if it were generally applicable, § 241 (f) does not cover the aliens involved in these two cases, because neither of them was "otherwise admissible" at the time of entry.

I.

Section 241 (f) by its terms neutralizes only those "provisions . . . relating to the deportation of aliens within the United States on the ground that they . . . sought to procure . . . entry into the United States by fraud or misrepresentation . . . ." Although the aliens in these two cases could have been deported under those "provisions," the deportation proceedings in both cases were in fact brought on grounds unrelated to their procurement of fraudulent visas. Both aliens were ordered to be deported, not because of their fraud, but because they were not properly within their countries' quotas.

The plain terms of § 241 (f), therefore, do not even potentially apply to these aliens.[2] To hold that § 241 (f) is relevant to these cases is tantamount to holding that

[2] The Court states that the Government "concedes" and that "administrative authorities have consistently held that § 241 (f) waives any deportation charge that results directly from the misrepresentation." *Ante*, at 217. But this concession and administrative practice fall far short of covering these cases. For here the grounds for deportation did not "[result] directly from the misrepresentation." They antedated and were the reason for the misrepresentation. The "administrative authorities" cited by the Court turned upon this distinction. In *Matter of Y—*, 8 I. & N. Dec. 143 (1959), for example, the Board of Immigration Appeals broadened § 241 (f) enough to cover fraud-related administrative procedural defects in the alien's entry. It is this construction of § 241 (f) which the Government concedes, not the Court's construction which broadens the statute to excuse all disqualifications for entry.

it is applicable to bar deportation based on any ground at all so long as the alien lied about that ground at the time of his unlawful entry.[3] I think nothing could be further from the statutory language or the congressional purpose.

II.

But even if § 241 (f) were generally applicable, these aliens could not claim its benefits because they were not within their respective national immigration quotas and therefore were not "otherwise admissible" at the time they entered the United States. That is the clear import of the statutory qualification, if its words are to be taken at their face value. That, too, has been the uniform and consistent administrative construction of the statute. See *Matter of D'O—*, 8 I. & N. Dec. 215 (1958); *Matter of Slade*, 10 I. & N. Dec. 128 (1962).

To except quota requirements of admissibility from the statutory qualification of "otherwise admissible" would undercut the elaborate quota system which was for years at the heart of the immigration laws. Yet the legislative history of the predecessor of § 241 (f), § 7 of the 1957 Act, makes clear that the limited relief given by the statute was to have no effect at all on the quota system.[4]

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[3] Thus, a Communist who had lied to the immigration authorities about his party membership at the time of entry could invoke § 241 (f) and remain in this country, while one who had told the truth, but was admitted by virtue of an administrative error, could be deported. See § 212 (a)(28), Immigration and Nationality Act.

[4] Senator Eastland, Chairman of the Committee which sponsored the 1957 amendments to the Immigration Act, stated, "the bill does not modify the national origins quota provisions." 103 Cong. Rec. 15487 (Aug. 21, 1957). See also 103 Cong. Rec. 16300 (Aug. 28, 1957) (remarks of Congressman Celler), "[The bill] makes no changes—no changes whatsoever, in the controversial issue of the national origins quota system."

Pub. L. 89-236, 79 Stat. 911, made substantial changes in the quota system. But that statute, passed in 1965, hardly indicates a

Moreover, the consistent use of the same qualifying phrase, "otherwise admissible" in other sections of the Immigration and Nationality Act makes clear that, as a term of art, it includes quota admissibility. The term typically follows a definition of grounds for admissibility or for exceptions to deportation, to insure that all the other relevant requirements of the Act are imposed upon the alien.[5]

Thus the plain meaning of the "otherwise admissible" qualification, as well as legislative policy and legislative history, all indicate that the term serves the same basic function in § 241 (f) as in other sections of the Act. Fraud is removed as a ground for deportation of those with the requisite family ties, and "otherwise admissible" insures the integrity of the remainder of the statutory scheme.[6]

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congressional intent in 1957 or in 1961 (when the present statute was revised) to abandon quota requirements.

[5] See, *e. g.*, §§ 211 (a) and (b); The War Brides Act, 59 Stat. 659.

[6] Under § 7 of the 1957 Act certain aliens had to establish both that they were "otherwise admissible" and that they had not lied to evade quota restrictions. The Court reasons from this that quota restrictions are not embodied in the "otherwise admissible" qualification. But this reasoning is inconsistent with the Court's conclusion concerning the general applicability of § 241 (f), discussed in Part I of this dissent.

Section 7 of the earlier Act provided as follows:

"The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, *or* (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who . . . ." (Emphasis supplied.)

If the present meaning of "otherwise admissible" is to be determined by the 1957 Act, so then must other parts of the statute be similarly determined. Section 241 (f) begins with words almost identical

The Court justifies its disregard of the plain meaning and consistent administrative construction of § 241 (f) by resort to the spirit of humanitarianism which is said to have moved Congress to enact the statute. No doubt Congress in 1957 was concerned with giving relief to some aliens who had entered this country by illegal means and established families here. But the people who were to benefit from this genuine human concern were those from countries like Mexico, which had no quota restrictions, and those who had misrepresented their national origins in order to avoid repatriation to Iron Curtain countries. There is nothing to indicate that Congress enacted this legislation to allow wholesale evasion of the Immigration and Nationality Act or as a general reward for fraud.

I respectfully dissent.

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to those quoted above. But the second ground of applicability—to "aliens who were not of the nationality specified in their visas"—is omitted. Thus, lies about nationality were not forgiven by the first part of the 1957 Act and are not, by the Court's reasoning, excused by § 241 (f), the successor statute. And since there is nothing to distinguish lies about nationality that avoid quota restrictions from other lies with the same effect, the reasoning that leads to the Court's conclusion that the aliens were "otherwise admissible" leads also to the conclusion that § 241 (f) is not applicable at all in these cases.

FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MORRIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 800. Argued December 5, 1966.—Decided December 12, 1966.

Georgia's Constitution since 1824 has provided that a majority of the state legislature shall select the Governor from the two candidates with the highest number of votes in a general election where no gubernatorial candidate received a majority vote, a situation which arose in the November 8, 1966, general election. On equal protection grounds a three-judge District Court invalidated the provision. *Held:* Georgia's provision for selecting a Governor is not invalid under the Equal Protection Clause of the Fourteenth Amendment. Pp. 233–236.

(a) A State can permit its legislative body to elect its Governor, there being no federal constitutional provision prescribing the method a State must use to select its Governor. *Gray* v. *Sanders*, 372 U. S. 368, distinguished. Pp. 233–234.

(b) The Georgia Legislature is not disqualified for malapportionment to elect a Governor, since under *Toombs* v. *Fortson*, 384 U. S. 210, this Court held that it could function until May 1, 1968. P. 235.

(c) The obligation under an oath taken by Democratic members of the legislature to support party candidates ended with the last general election, which is over. Pp. 235–236.

262 F. Supp. 93, reversed.

Harold N. Hill, Jr., Assistant Attorney General of Georgia, argued the cause for appellant. With him on the briefs were *Arthur K. Bolton*, Attorney General, *G. Ernest Tidwell*, Executive Assistant Attorney General, *Coy R. Johnson*, Assistant Attorney General, and *Gerald H. Cohen* and *Alexander Cocalis*, Deputy Assistant Attorneys General.

Charles Morgan, Jr., argued the cause for appellees Morris et al. With him on the briefs were *Morris Brown*

and *Melvin L. Wulf*. *Emmet J. Bondurant II* argued the cause for appellees Justice et al. With him on the briefs were *Francis Shackelford* and *Randolph W. Thrower*.

MR. JUSTICE BLACK delivered the opinion of the Court.

Since 1824 a provision of the Constitution of the State of Georgia, now Art. V, § I, ¶ IV, has provided that its Governor shall be selected (1) by a majority of votes cast in a general election, and (2) if no candidate receives a majority of votes at such election, then a majority of the members of the Georgia General Assembly shall elect the Governor "from the two persons having the highest number of votes . . . ." [1] At the State's general election, held Tuesday, November 8, 1966, no single candidate received a majority of the votes cast. A Georgia three-judge federal district court has in this case enjoined the State Assembly from electing one of the two highest candidates as Governor on the ground that this method of election, required by Article V of the Georgia Constitution, would deny Georgia voters equal protection of the laws in violation of the Fourteenth Amendment. We

[1] Article V, § I, ¶ IV (Ga. Code Ann. § 2-3004). "How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

uphold the constitutionality of Article V of the State Constitution, for so long as this provision is applied as it is written, we perceive no conflict with the Equal Protection Clause. We reverse the District Court's judgment.

The District Court erroneously relied on *Gray* v. *Sanders*, 372 U. S. 368, to strike down Article V of the State's Constitution. The *Gray* case held that it had been demonstrated that Georgia voters were denied equal protection of the laws by the operation of a county-unit system under which state officials were elected by a majority of counties voting as units instead of by a majority of individual voters. The result was that the number of votes of persons living in large counties was given no more weight in electing state officers than was given to a far fewer number of votes of persons residing in small counties. This discrimination against large county voters was held to deny them the equal protection of the laws. That case, as was emphasized, had to do with the equal right of "all who participate in the election," 372 U. S., at 379, to vote and have their votes counted without impairment or dilution. But as the Court said, 372 U. S., at 378, the case was "only a voting case." Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly. It is wrongly cited as having either expressly or impliedly decided that a State cannot, if it wishes, permit its legislative body to elect its Governor.

The language of Article V of the State Constitution struck down by the District Court has been a part of Georgia's State Constitution since 1824 and was re-adopted by the people in 1945. It set up two ways to

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select the Governor. The first, and preferred one, was election by a majority of the people; the second, and alternative one, was election by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as, in effect, nominating votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. A method which would be valid if initially employed is equally valid when employed as an alternative. It would be surprising to conclude that, after a State has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate. Statewide elections cost time and money and it is not strange that Georgia's people decided to avoid repeated elections. The method they chose for this purpose was not unique, but was well known and frequently utilized before and since the Revolutionary War. Georgia Governors were selected by the State Legislature, not the people, until 1824. At that time a new constitution provided for popular election, but with the provision that upon the failure of any one candidate to receive a majority, the General Assembly should elect.

Two States, Mississippi and Vermont,[2] that provide for majority voting also provide for state legislative election of their governors in case of no majority in the general election. Thirty-eight States of the Union which today provide for election of their governors by a plurality also

[2] Miss. Const., Art. 5, §§ 140, 141; Vt. Const., c. II, § 39.

provide that in case of a tie vote the State Legislatures shall elect.[3]

It thus turns out that Georgia, clearly acting within its rights as a State, has decided that, any one candidate failing to obtain a majority in a general election, its General Assembly will elect its Governor. Its clear choice has remained in its constitution for 142 years. The District Court below treated Article V of the Georgia Constitution as the valid law of the State except as it thought itself compelled to strike it down because of *Gray* v. *Sanders, supra.* The *Gray* case, however, did no more than to require the State to eliminate the county-unit machinery from its election system. The State did this in an election that resulted in the election of no candidate. Its duty now, under Article V of its Constitution, is to proceed to have the General Assembly elect its Governor from the two highest candidates in the election, unless, as some of the parties contend, the entire legislative body is incapable of performing its responsibility of electing a Governor because it is malapportioned. But this is not correct. In *Toombs* v. *Fortson,* 384 U. S. 210, affirming 241 F. Supp. 65, we held that with certain exceptions, not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution. Neither is it disqualified by the fact that its Democratic members had obligated themselves to

[3] This is by statutory provision in North Carolina and by constitutional provision in Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

support the Democratic nominee in the general election on November 8, 1966. That election is over, and with it terminated any promises by the Democratic legislators to support the Democratic nominee.

Article V of Georgia's Constitution provides a method for selecting the Governor which is as old as the Nation itself. Georgia does not violate the Equal Protection Clause by following this article as it was written.

Reversed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE FORTAS concur, dissenting.

This is an appeal from a decision of a three-judge district court declaring unconstitutional and enjoining the enforcement of Article V, Section I, Paragraph IV, of the Georgia Constitution which authorizes the election of the Governor of Georgia by the General Assembly when no candidate has received a majority of the total votes cast in the general election.[1]

We are told that in the November 8, 1966, general election for Governor, there were 955,770 votes cast as follows:

Howard H. Callaway.....	449,894 votes	or 47.07%
Lester G. Maddox.....	448,044 votes	or 46.88%
Ellis G. Arnall.....	57,832 votes	or 6.05%

The Georgia Election Code provides that "[n]o candidate shall be nominated for public office in any primary

[1] The Georgia Constitution, Art. V, § I, ¶ IV, provides:

"The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons

or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office." Ga. Code Ann. § 34–1514 (Supp. 1965). That law goes on to provide that where no candidate "receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes," and the candidate who receives "a majority of the votes cast in such runoff" shall be declared the winner. The Attorney General of Georgia rendered an opinion on October 21, 1966, that the provisions of § 34–1514 were in conflict with the provisions of the Georgia Constitution and that the latter controlled in the event no candidate for Governor received a majority in the general election.

This action for a declaratory judgment was brought by citizens of Georgia residing in counties throughout the State who voted in the November 8, 1966, general election for Governor. They ask for the benefit of a runoff election between the two candidates who received the highest number of votes as provided in § 34–1514 or a special election pursuant to the Georgia Election Code.[2] The District Court held the provision of the Georgia Constitution which placed the election of the Governor in the General Assembly unconstitutional and void.

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having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

[2] Ga. Code Ann. § 34–1515 (Supp. 1965) provides:

"Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a runoff primary or election . . . then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position."

262 F. Supp. 93. It issued a stay for a period of 10 days so as to enable the appellant to seek an additional stay here and retained jurisdiction for such other and further proceedings as might be deemed applicable and just. The case is here by appeal which we noted, and we expedited the hearing because of the urgency of the issue presented. *Post*, p. 955.

The Court misstates the question we must decide. It is not whether Georgia may select a Governor through a legislative election.[3] It is whether the legislature may make the final choice when the election has been entrusted to the people and no candidate has received a majority of the votes. In other words, the legislative choice is only a part of the popular election machinery. The 1824 amendment to the 1798 Constitution of Georgia, which gave the legislature power to elect a governor, treated that stage as only one of two in the general election.[4] The first stage, then as now, was an election open to "the persons qualified to vote for members of the general assembly." Ga. Const. 1798, Art. II, § 2, as amended, 1824.

It is said that the general election is over and that a new, and different, alternative procedure is now about to be used. But that is belied by the realities. The primary election selected the party candidates, the choices of the two parties are still in balance, and the legislative choice is restricted to those two candidates. The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office. Up to then the vacancy which occasioned the election has not been filled.

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[3] Georgia's state auditor is chosen by the legislature. Ga. Code Ann. § 40-1801.

[4] Originally Georgia left the selection of Governor to the legislature, the House selecting three candidates and the Senate choosing one of the three by majority vote. Ga. Const. 1789, Art. II, § 2.

Our starting point is what we said in *Gray* v. *Sanders*, 372 U. S. 368, 379–380:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

It is argued with earnestness that if the electoral college can be used to select a President, a legislature can be used to select a governor. It is said that there is no more a violation of the "one person, one vote" principle in the one than in the other. But the Twelfth Amendment creates the exception in case of a President. There is no like exception in the choice of a governor.[5]

> "The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. . . . But once the class of

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[5] "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued." *Gray* v. *Sanders*, 372 U. S. 368, 378.

> voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. . . .
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> . . . . . .
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> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders, supra,* at 380–381.

If the legislature is used to determine the outcome of a general election, the votes cast in that election would be weighted, contrary to the principle of "one person, one vote." All the vices we found inherent in the county unit system in *Gray* v. *Sanders* are inherent when the choice is left to the legislature. A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority.[6] He would not be under a mandate to follow the majority or plurality votes in his constituency, but might cast his single vote on the side of the minority in his district. Even if he voted for the candidate receiving a plurality of votes cast in his district and even if each Senator and Representative followed the same course, a candidate who received a minority of the popular vote might receive a

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[6] In *Gray* v. *Sanders, supra,* in speaking of this same vice in the county unit system we said:

". . . if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded." 372 U. S., at 381, n. 12.

clear majority of the votes cast in the legislature. As stated by the District Court:

> "The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. This would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored." 262 F. Supp., at 95.

I have said enough to indicate why the substitution of the Georgia Legislature for a runoff vote is an unconstitutional weighting of votes, having all the vices of the county unit system that we invalidated in *Gray* v. *Sanders*.

What is approved today can, moreover, be the instrument to perpetuate a "one party" system in like derogation of the principle of "one person, one vote." The pledge that every Democratic member of the Georgia Legislature took provides in part: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia." That election has not been completed. We are, as I have said, in the second stage of it. The Democrats control 183 seats [7] in a 205-member House and 46 seats in a 54-member Senate. We

[7] This figure does not take into account a runoff election held on November 22, 1966, to fill a House seat.

would be less than naive to believe that the momentum of that oath has now been dissipated and that the predominantly Democratic legislature has now become neutral.

The fact that this constitutional provision allowing the legislature to choose the Governor was adopted by the people of Georgia is "without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds* v. *Sims*." See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 737. We dealt there with an apportionment plan that had been adopted by a popular referendum. We repeat what we said: "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Id.*, 736–737.

I would affirm the judgment of the three-judge court and remand the cause for the fashioning of an appropriate decree for a runoff election in which the people's choice will be determined.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

I join the opinion of my Brother DOUGLAS, but I add the following:

The specific question before us is the validity of the Georgia constitutional provision which, after vesting in the people "full and complete power to elect a Governor," [1] provides that if no candidate receives a majority, the legislature shall select the winner from the two candidates receiving the highest popular vote. The legislature may select the candidate who received fewer popu-

[1] *Thompson* v. *Talmadge*, 201 Ga. 867, 880, 41 S. E. 2d 883, 895 (1947). *Thompson* invalidated selection of a Governor by the legislature when the candidate who received a majority of the votes cast died before taking office.

lar votes than his rival. In my opinion, this scheme is forbidden by the Equal Protection Clause of the Fourteenth Amendment as construed by this Court.

1. *Gray* v. *Sanders*, 372 U. S. 368 (1963), related to Georgia primary elections to nominate candidates for statewide office, including Governor. It held that where the vote cast by each citizen does not have full and equal effect as a result of operation of the county unit system, the Equal Protection Clause is violated. If the Constitution of Georgia incorporated the county unit system as part of the mechanics for election of Governor, I assume there would be no doubt that *Gray* v. *Sanders* would invalidate the provision. Unless the Court is overruling *Gray* v. *Sanders*, it presumably would not validate a Georgia constitutional provision which said that if a majority of the votes are not cast for one candidate, they will be recomputed on a county unit basis which is not proportionate to the voting population, and the result of that recomputation would determine the winner. It is no less a denial of equal protection of the laws for the result of an election to be determined, not by the voters, but by the legislature on a basis which is not related to the votes cast. No less than the county unit system, this means that the vote cast by a citizen is subject to nullification by the legislature. The integrity of the vote is undermined and destroyed by any scheme which can result in the selection of a person as Governor who receives the lesser number of popular votes. If the voting right is to mean anything, it certainly must be protected against the possibility that victory will go to the loser.

2. It distorts reality to say, as the majority here do, that this election is to be scrubbed and ignored, and to proceed as if we were dealing with a situation in which Georgia's Constitution merely provided for the selection of a Governor by the legislature. That is *not* the case.

If it were the intent of the Constitution to scrub the popular election and to cause selection by the legislature as an independent process, the legislature would not be bound to select from the two who received at the polls the highest number of votes. The legislature would be given free choice. As my Brother DOUGLAS' opinion shows, the Constitution attempts something quite different. It purports to give the legislature power to complete the process begun at the polls—to cast aside the vote of the electorate and award the office to the winner or the loser of the popular election, as it may see fit. The analogy to *Gray* v. *Sanders* is clear. This is just as if, for example, the voters expressed their preferences at the polls, and then the winner was selected not on the basis of receiving most votes, but on the basis of selection by officials of the counties concerned.[2]

3. The Georgia Legislature is concededly malapportioned, and is under a federal court order to reapportion itself. *Toombs* v. *Fortson*, 384 U. S. 210 (1966), affirming 241 F. Supp. 65 (D. C. N. D. Ga. 1965). See also *Fortson* v. *Toombs*, 379 U. S. 621 (1965). A majority of the legislators in Georgia's legislature may represent a minority of the voters. But the Court today concludes that despite the fact that it has branded the legislature as apportioned in violation of the Constitution of the United States, it may nevertheless select the Governor. The Court states as its reason for disregarding this that "In *Toombs* v. *Fortson* . . . we held that with certain exceptions, not here material, the Georgia Assembly

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[2] This would resemble the presidential electoral college system. *Gray* v. *Sanders* expressly states that while this system is beyond judicial reach because it is specifically incorporated in the Federal Constitution, it does not indicate the constitutionality of analogous state schemes. 372 U. S., at 378. See also *Reynolds* v. *Sims*, 377 U. S. 533, 572–577 (1964).

could continue to function until May 1, 1968." This is indeed a weak reed for so monumental a conclusion. The use of a malapportioned legislature to select a Governor is to perpetuate the electoral vices which this Court decreed that the Equal Protection Clause of the Fourteenth Amendment forbade a State to incorporate in its election procedures. *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Gray* v. *Sanders, supra.* We have declined to deprive a malapportioned legislature of its *de facto* status as a legislature. But not until today has this Court allowed a malapportioned legislature to be the device for doing indirectly what a State may not do directly. If this Court had foreseen that events would place the Georgia Legislature in a position to override the vote of a plurality of the voters and to select as Governor of the State the loser at the polls, I expect that it would have included this power as one of the "exceptions," forbidden to this legislature which, this Court has held, functions only by judicial sufferance despite its constitutional infirmity. To a reader of *Gray* v. *Sanders, Fortson* v. *Toombs,* and *Toombs* v. *Fortson,* it must seem inconceivable that the Court would permit this malapportioned legislature to select Georgia's Governor in these circumstances. Indeed, the irony of the matter is that a three-judge federal court held that the Georgia Legislature was so malapportioned that it could not properly submit to the voters a new Constitution, adopted by both houses of the Georgia Legislature, which would have abolished the provisions for legislative selection of a Governor and have substituted a runoff or special election. See *Fortson* v. *Toombs, supra.* On appeal, this Court, *per curiam,* declined to rule that the District Court's decree was unlawful, but because it was represented that the decree might be moot, the Court remanded for reconsideration in light of the circumstances

which allegedly made the decree no longer pertinent. *Fortson, supra.* But now the Court holds that this same unreformed legislature is not so malapportioned that it cannot itself select the Governor by its direct action! I confess total inability to understand how the two rulings can be reconciled.

4. In denying the applicability of *Gray* v. *Sanders*, the Court says that it was "only a voting case" and that it has nothing to do with a State's decision that the voters will be ousted from their functions, the votes cast by them nullified, and the legislature authorized to select the candidate that most of the electorate repudiated. I respectfully submit that this, too, is "a voting case." It is no less a voting case because it deals with a state mechanism for *total* disregard of the principle of one man, one vote. It is no less a voting case because it deals with the election of the Governor rather than his nomination as in *Gray* v. *Sanders*. I should assume—diffidently in view of today's startling result—that this Court would not rule that the Federal Constitution would tolerate a state constitutional provision that would enable the Governor to appoint the legislature—or to appoint any legislators for election districts if no candidate received a majority of the votes—or two-thirds—or three-fourths. But there is no difference in principle between this and the result sanctioned today. If a State can validly provide that the result at the polls can be disregarded and the outcome removed from democratic processes where no candidate for Governor receives a majority, there is no reason why the same rule cannot be applied to legislators. Moreover, the Court today announces in an offhand manner, as a side effect of today's decision, without adequate argument or consideration, that a State may today, as some States did long ago, provide that its Governor shall be selected by its legislature in total disregard of the

voters. I do not believe that the issue is so easy. Much water has gone under the bridge since the late 1700's and the early 1800's. Our understanding and conception of the rights guaranteed to the people by the "stately admonitions" [3] of the Fourteenth Amendment have deepened, and have resulted in a series of decisions,[4] enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties as they existed in 1824, the date when Georgia adopted its present system of choosing a Governor. I have no doubt, for example, that in the early days of the Nation many of the state legislatures were malapportioned. See *Reynolds* v. *Sims, supra,* at 573, n. 53, and 602–607 (dissent). But this did not enshrine that condition forever beyond the reach of constitutional prohibition. Certainly, the antiquity of the practice did not cause this Court to refrain from invalidating malapportionment under the Equal Protection Clause. As Mr. Justice Holmes said long ago,

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our

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[3] Learned Hand, Spirit of Liberty 163 (1960).

[4] See, *e. g., Baker* v. *Carr,* 369 U. S. 186 (1962); *Gray* v. *Sanders, supra; Wesberry* v. *Sanders,* 376 U. S. 1 (1964); *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966).

whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920).[5]

5. I do not believe that this Court is the sole custodian of the Constitution, or of the democratic liberties of the people. The power and the responsibility rest also with

[5] Only last Term, the Court held in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), that the right to vote in state elections cannot be burdened or conditioned by a poll tax. We observed:

"We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics' (*Lochner* v. *New York*, 198 U. S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan*, 378 U. S. 1, 5–6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." 383 U. S., at 669.

See also the classic statement by Mr. Justice Brandeis, in his dissent in *Olmstead* v. *United States*, 277 U. S. 438, 472 (1928):

"'We must never forget,' said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 'that it is a constitution we are expounding.' Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. . . . We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387; *Buck* v. *Bell*, 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."

See also *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

the States, the people, and with lower courts, including the courageous District Court that in the present case insisted upon following this Court's decision in *Gray* v. *Sanders*. But if the people of Georgia—or Maine or California or New York, for that matter—should adopt a constitutional amendment to provide for election of their Governor by the legislature—or for selection of the upper house of their legislature by their Governor, for example—I do not believe that the constitutionality of these measures could be cavalierly assumed. Perhaps this Court's voting rights cases could not so easily be nullified. Their meaning and thrust are perhaps deeper than the mechanics of the tally. They are, one may hope, not merely much ado about form. They represent, one has been led to believe, an acknowledgment that the republican form of government guaranteed by the Constitution, read in light of the General Welfare Clause, the guaranties of equal protection of the laws and the privileges and immunities of citizens of the United States, requires something more than an adherence to form. This Court's apportionment and voting rights decisions soundly reflect a deepening conception, in keeping with the development of our social, ethical, and religious understanding, of the meaning of our great constitutional guaranties. As such, they have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal. Today's decision is a startling reversal; a belittling, I say with all respect, of our Constitution's dynamic provisions with respect to the basic instrument of democracy—the vote.

6. The Court brushes off *Gray* v. *Sanders* by saying that it has to do only with the "equal right" of all voters "to vote and have their votes counted without impairment or dilution." That is so. But that is precisely the issue in the present case. We have not heretofore been

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so beguiled by changes in the scenery that we have lost sight of principle. See *Terry* v. *Adams*, 345 U. S. 461, esp. 465, n. 1 (1953); *Smith* v. *Allwright*, 321 U. S. 649, 661 (1944). See also *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). Here, too, we are dealing at least with the "impairment" of the vote—indeed, with the obliteration of its effect. It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected.

A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court.

In short, we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws from nullification except by the voters themselves. The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis or unless, in a runoff or some other type of election, the *people* properly and regularly, by their votes, decide differently. "The right to vote is too important in our free society to be stripped of judicial protection" [6] by any other interpretation of our Constitution.

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[6] *Wesberry* v. *Sanders*, *supra*, at 7.

In essence, *Gray* v. *Sanders* held that the Equal Protection Clause is violated when persons are elected to statewide office on a basis other than their receiving more votes than their rivals. In my opinion, this principle is exactly applicable here.

It is with the greatest regret that I conclude that today's decision reflects a retreat from constitutional principles so soundly and so proudly developed to apply the Constitution's magnificent admonitions to the deepening moral and human principles of our time. I would affirm the District Court.

FIRST NATIONAL BANK OF LOGAN *v.* WALKER BANK & TRUST CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 51. Argued November 7–8, 1966.—Decided December 12, 1966.*

The provisions of the National Bank Act, 12 U. S. C. § 36 (c), which authorize a national banking association, with the Comptroller of the Currency's approval, to establish and operate branch banks if such operation is "at the time expressly authorized to State banks by the law of the State in question," place national and state banks on a basis of "competitive equality" as far as branch banking is concerned, and national banks may establish branches only in accordance with all requirements and conditions applicable to state banks by state law. Pp. 256–262.

No. 51, 352 F. 2d 90; and Nos. 73 and 88, affirmed.

Theodore S. Perry argued the cause and filed briefs for petitioner in No. 51. *John J. Wilson* argued the cause for petitioner in No. 73. With him on the briefs was *Charles J. Steele*. *Richard A. Posner* argued the cause for petitioner in No. 88. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Kathryn H. Baldwin*.

Joseph S. Jones argued the cause and filed a brief for respondent in No. 51. *James F. Bell* argued the cause and filed a brief for respondent in Nos. 73 and 88.

Robert Y. Button, Attorney General, and *Kenneth C. Patty*, Assistant Attorney General, filed a brief for the Commonwealth of Virginia, as *amicus curiae*, urging

*Together with No. 73, *First Security Bank of Utah, N. A.* v. *Commercial Security Bank*, and No. 88, *Saxon, Comptroller of the Currency* v. *Commercial Security Bank*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

affirmance in all cases. *Henry T. Wickham* filed a brief for the Virginia Bankers Association, as *amicus curiae*, urging affirmance in Nos. 73 and 88.

MR. JUSTICE CLARK delivered the opinion of the Court.

These cases involve the construction of those portions of the National Bank Act, 44 Stat. 1228, 12 U. S. C. § 36 (c), which authorize a national banking association, with the approval of the Comptroller of the Currency, to establish and operate new branches within the limits of the municipality in which the bank is located, if such operation is "at the time expressly authorized to State banks by the law of the State in question." [1] Two national banks with their main banking houses in Logan and Ogden, Utah, respectively, seek to open branches in those municipalities. The Utah statute prohibits Utah banks, with certain exceptions not here relevant, from establishing branches except by taking over an existing bank which has been in operation for not less than five years. Utah Code Ann., Tit. 7, c. 3, § 6 (1965 Supp.).[2] In No. 51,

[1] The National Bank Act, 44 Stat. 1228, 12 U. S. C. §§ 36 (c) (1) and (2) provides:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[2] Utah Code Ann., Tit. 7, c. 3, § 6 (1965 Supp.), provides:

"*7–3–6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.*—The business of every

First National Bank of Logan v. *Walker Bank & Trust Co.*, the petitioner seeks to establish a new branch in Logan, where its principal banking house is located, without taking over an established bank. The District Court approved its doing so but the Court of Appeals reversed. 352 F. 2d 90 (C. A. 10th Cir.), *sub nom. Walker Bank & Trust Co.* v. *Saxon.* In No. 73, *First Security Bank of Utah, N. A.* v. *Commercial Security Bank,* and No. 88, *Saxon* v. *Commercial Security Bank,* First Security seeks to establish a new branch in Ogden, in which its home office is situated, without taking over an established bank. The District Court held that state law must be complied with, 236 F. Supp. 457, and the Court of Appeals affirmed in a judgment, without opinion, citing *Walker Bank & Trust Co., supra.* In view of a conflict between these holdings and the decision in *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (C. A. 4th Cir.), we granted certiorari, and consolidated the three cases for argument. 384 U. S. 925. We affirm the judgments.

1. *The Facts.*

In No. 51, the petitioner maintains its principal banking house in Logan, Utah, which is a second class city

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bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

. . . . .

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

under Utah law (Utah Code Ann., Tit. 10, c. 1, § 1 (1953, as amended)), and is therefore subject to § 7–3–6 of the Utah Code, *supra*. It applied to the Comptroller of the Currency for a certificate to establish an "inside" branch office in Logan. At the time of the application there were no other banks with their main banking offices in Logan. However, there were two branches of banks whose home offices were situated outside of Logan, one of which belonged to respondent, Walker Bank & Trust Co., whose home office was located in Salt Lake City. After a hearing, the Comptroller ordered the certificate issued. The respondent subsequently filed this suit seeking a declaratory judgment and injunctive relief against the Comptroller and First National claiming the action of the Comptroller to be void since the proposed branch was not taking over an established bank in Logan, as required by Utah law. The District Court dismissed the complaint. It found "express authority" under Utah law for state banks to establish branch offices in Logan, relying on the general authority of the statute and holding that the subsequent conditions, such as the acquisition of another bank, did not "change the 'express authority' into a lack of authority on the part of State banks or a lack of a statutory expression of such authority, and [did] not add to the Federal statute a requirement that compliance be made by National banks with all State conditions." 234 F. Supp. 74, 78, n. 8. The Court of Appeals reversed, holding that the Congress in enacting § 36 (c)(1) acceded to state law and created "a competitive equality between state and national banks." Finding that the trial court's interpretation was to the contrary, it declared "the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it." 352 F. 2d 90, 94.

In Nos. 73 and 88, the First Security Bank of Utah, a national bank, applied for a certificate from the Comptroller to establish a branch bank in Ogden, where it maintained its principal banking house. Its proposal was to open a new branch and not to take over an existing bank in Ogden. Under Utah law, Ogden is also a second class city and the "take over" provision of § 7–3–6, *supra,* was therefore applicable. Two other banks have their main offices in Ogden. After the Comptroller approved the issuance of the certificate, respondent filed suit in the District Court of the United States for the District of Columbia asking for injunctive and other relief. The District Court imposed all of the restrictions of § 7–3–6 of Utah law on the establishment of national banks and the Court of Appeals for the District of Columbia Circuit affirmed, by a judgment without opinion, but cited the opinion of the 10th Circuit, *Walker Bank & Trust Co., supra.*

2. *The National Bank Act: Its Background.*

There has long been opposition to the exercise of federal power in the banking field. Indeed, President Jefferson was opposed to the creation of the first Bank of the United States and President Jackson vetoed the Act of Congress extending the charter of the second Bank of the United States. However, the authority of Congress to act in the field was resolved in the landmark case of *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). There Chief Justice Marshall, while admitting that it does not appear that a bank was in the contemplation of the Framers of the Constitution, held that a national bank could be chartered under the implied powers of the Congress as an instrumentality of the Federal Government to implement its fiscal powers. The paramount power of the Congress over national banks has, therefore, been settled for almost a century and a half.

Nevertheless, no national banking act was adopted until 1863 (12 Stat. 665), and it was not until 1927 that Congress dealt with the problem before us in these cases. This inaction was possibly due to the fact that at the turn of the century, there were very few branch banks in the country. At that time only five national and 82 state banks were operating branches with a total of 119 branches. By the end of 1923, however, there were 91 national and 580 state banks with a total of 2,054 branches.[3] The Comptroller of the Currency, in his Annual Report of 1923, recommended congressional action on branch banking. The report stated that if state banks continue to engage "in unlimited branch banking it will mean the eventual destruction of the national banking system . . . ." H. R. Doc. No. 90, 68th Cong., 1st Sess., 6 (1924). Soon thereafter legislation was introduced to equalize national and state branch banking. The House Report on the measure, H. R. Rep. No. 83, 69th Cong., 1st Sess., 7 (1926), stated among other things:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws."

This bill failed to pass in the Senate and, although Congress continued to study the problem, it was not until

[3] Board of Governors of the Federal Reserve System, Banking Studies 15, 428 (1941).

1927 that the McFadden Act was adopted. The bill originated in the House and, in substance, proposed that both national and state banks be permitted to establish "inside" branches within the municipality of their main banking facilities in those States that permitted branch banking at the time of the enactment of the bill. H. R. Rep. No. 83, 69th Cong., 1st Sess., 4–5 (1926). The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching. The Senate Report concluded that the Act should permit "national banks to have branches in those cities where State banks are allowed to have them under State laws." S. Rep. No. 473, 69th Cong., 1st Sess., 14 (1926). In the subsequent Conference Committee, the Senate position was adopted. State banks which were members of the Federal Reserve System were also limited to "inside" branches. A grandfather clause permitted retention of branches operated at the date of enactment. H. R. Rep. No. 1481, 69th Cong., 1st Sess., 6 (1926). The Act was finally passed on February 25, 1927, and became known as the McFadden Act of 1927, taking its name from its sponsor, Representative McFadden. At the time of its enactment he characterized it in this language:

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been established among all member banks of the Federal reserve system." (Emphasis added.) 68 Cong. Rec. 5815 (1927).

During the economic depression there was much agitation that bank failures were due to small undercapitalized rural banks and that these banks should be supplanted by branches of larger and stronger banks. The Comptroller of the Currency advocated that national banks be permitted to branch regardless of state law. Hearings before a Subcommittee of the Senate Committee on Banking and Currency pursuant to S. Res. No. 71, 71st Cong., 3d Sess., 7–10 (1931). Senator Carter Glass held a similar belief and introduced a bill that would authorize national banks to organize branches irrespective of state law beyond and "outside" the municipality of its principal banking house. His proposal was strenuously opposed and was eventually defeated. It was not until the Seventy-third Congress that the Banking Act of 1933 was adopted. Senator Glass, the ranking member of the Senate Committee on Banking and Currency and the dominant banking figure in the Congress, was sponsor of the Act. In reporting it to the Senate for passage, he said, the Act "required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks." 77 Cong. Rec. 3726 (1933). In a colloquy on the floor of the Senate with Senator Copeland as to the purpose of the Act (with reference to branch banking by national banks), Senator Glass said that it would be permissible "in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking." Moreover, to make it crystal clear, when Senator Copeland replied that "it permits branch banking only in those States where the State laws permit branch banking by State banks," Senator Glass was careful to repeat: *"Only in those States and to the extent that the State laws permit branch banking."* (Emphasis added.) 76 Cong. Rec. 2511 (1933). Remarks of other

members of Congress also indicate that they shared the understanding of Senator Glass. For example, Senator Vandenberg stated that § 36 (c)(1) provides "that the branch-banking privilege so far as national banks are concerned shall follow the status established by State law in respect to the State privilege." 76 Cong. Rec. 2262 (1933). Likewise, Senator Long, who had joined a filibuster against an earlier version of the bill, stated at final passage that "[w]e have only undertaken to secure equal treatment for State banks" and that the bill had substantially achieved that result. 77 Cong. Rec. 5862 (1933). In similar tone, Representative Bacon stated that branches of national banks may be established provided "this is permitted by the laws of that State and *subject to them.*" (Emphasis added.) 77 Cong. Rec. 3949 (1933). And Representative Luce, a member of the Conference Committee, reported to the House:

> "In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches." 77 Cong. Rec. 5896 (1933).

As finally passed, the Act permitted national banks to establish outside branches if such branches could be established by state banks under state law. It is well to note that the same Act also removed the restriction on outside branch banking by state member banks previously imposed by the McFadden Act.

3. *The Policy of Competitive Equality.*

It appears clear from this résumé of the legislative history of § 36 (c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned. Both sponsors of the applicable banking Acts, Representative McFadden and Senator Glass, so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864. See *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 565–566 (1934); *McClellan* v. *Chipman*, 164 U. S. 347 (1896); *Chase Securities Corp.* v. *Husband*, 302 U. S. 660 (1938); *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233 (1944).

The Comptroller argues that Utah's statute "expressly authorizes" state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there "only to the extent that the State laws permit branch banking." Utah clearly permits it "only to the extent" that the proposed branch takes over an existing bank.

The Comptroller also contends that the Act supersedes state law only as to "whether" and "where" branches may be located and not the "method" by which this is effected.

We believe that where a State allows branching only by taking over an existing bank, it expresses as much "whether" and "where" a branch may be located as does a prohibition or a limitation to the home office municipality. As to the restriction being a "method," we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of §§ 36 (c)(1) and (2), regardless of the tag placed upon it.

Affirmed.

Syllabus.

UNITED STATES *v.* FABRIZIO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

No. 47. Argued November 7, 1966.—Decided December 12, 1966.

Appellee was indicted for violating 18 U. S. C. § 1953 by knowingly carrying from New Hampshire to New York 75 "acknowledgments of purchase" for "use" in the New Hampshire State Sweepstakes. A purchase acknowledgment, a receipt for the buyer's retention, is practically a carbon copy of the sweepstakes ticket, which is retained in the machine at the time of purchase. Section 1953 proscribes the carriage in interstate commerce (except by a common carrier) of any record, paper, or writing designed for use in a wagering pool with respect to a sporting event. The statute exempts parimutuel betting equipment, the transportation of betting materials for bets or sporting events into a State where such betting is legal, or the transportation of newspapers. Appellee moved to dismiss the indictment, contending that § 1953 was intended to reach only organized crime or illegal gambling activities, neither of which was alleged; that the New Hampshire state lottery was not an "illegal" wagering pool; and that purchase acknowledgments were valueless and not for "use" in the state sweepstakes since their retention was not necessary to collect winnings. From the District Court's dismissal of the indictment as charging acts not within the purview of § 1953, a direct appeal was taken to this Court. *Held:* The indictment states an offense under 18 U. S. C. § 1953. Pp. 266–271.

(a) Congress manifested the broad purpose of thwarting the interstate movement of gambling paraphernalia by all persons except common carriers. Pp. 266–267.

(b) The exemptions, which are consistent with the broad reach of the statute, would have included state-run wagering pools had Congress so intended. Pp. 268–269.

(c) By receipting the purchase and assuring the ticket owner of proper registration, the acknowledgment serves a purpose and constitutes "use" in the sweepstakes within the meaning of § 1953, at least here where the Government contends that it will prove

that the acknowledgments specified in the indictment were being delivered by petitioner to out-of-state persons who had bought tickets through him. Pp. 269–271.

Reversed.

Jerome I. Chapman argued the cause for the United States, *pro hac vice*, by special leave of Court. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer.*

Betty D. Friedlander argued the cause and filed a brief for appellee.

Joseph A. Millimet, by special leave of Court, argued the cause for the State of New Hampshire, as *amicus curiae*, urging affirmance. With him on the brief was *George S. Pappagianis*, Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

An indictment filed in the United States District Court for the Western District of New York charged appellee, Fabrizio, with knowingly carrying "in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, . . . records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U. S. C." That section provides in pertinent part:

> "(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or

adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

"(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication."

In response to a limited demand for a bill of particulars the Government stated that the only records, papers, and writings in issue were the specified 75 acknowledgments, and that no violation of state law was charged. Appellee then moved to dismiss the indictment on the ground that it did "not set forth facts sufficient to charge the Defendant with the violation of" this statute. In a supporting affidavit three specific shortcomings were claimed. Appellee first contended that § 1953 was intended to reach only the activities of organized crime or those participating in an illegal gambling or lottery enterprise. Absent an allegation that he was of this class no crime under the statute was charged. Appellee also contended that the indictment was deficient under the statute for failure to name an "illegal" wagering pool, the New Hampshire lottery being a state enterprise. Finally, it was urged that the allegation in the indictment that the acknowledgments were "to be used, and adapted, devised and designed for use" in the New

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Hampshire Sweepstakes was impossible in fact or rested on a misinterpretation of "use" since the acknowledgments were valueless, and need not have been retained in order to collect on the sweepstakes.

The District Court thereupon dismissed the indictment holding that "[t]he charge in the indictment does not come within the purpose of Section 1953 . . . as disclosed in the legislative history of the Act." The Government brought the case directly here under the provisions of the Criminal Appeals Act, 18 U. S. C. § 3731. We noted probable jurisdiction, 383 U. S. 904. Our function under that Act is limited to the construction of the statute and "this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193. See also *United States* v. *Keitel*, 211 U. S. 370.[1] For reasons to follow, we reverse.

We turn to the specific deficiencies alleged by appellee, noting first that the indictment tracks the language of § 1953 and thus makes it incumbent upon appellee to demonstrate that the additional allegations he claims to be necessary are required to fulfill the statutory purpose. We may dispose quickly of appellee's first contention. The language of § 1953 makes it applicable to "Whoever, except a common carrier . . ." engages in the forbidden conduct. The need to exempt common carriers makes it clear that Congress painted with a broad brush, and did not limit the applicability of § 1953 in the respects urged by appellee. In companion legisla-

[1] Thus the sufficiency of the indictment as a pleading is not at issue, *United States* v. *Gilliland*, 312 U. S. 86, nor are questions relating to the bill of particulars presently before us. See *United States* v. *Comyns*, 248 U. S. 349, 353. Of course on remand these questions will remain unaffected by anything decided today.

tion where Congress wished to restrict the applicability of a provision to a given set of individuals, it did so with clear language.[2] A statute limited without a clear definition of the covered group, as would be the case with § 1953 under appellee's view of it, might raise serious constitutional problems. *Lanzetta* v. *New Jersey*, 306 U. S. 451. And the asserted restriction would defeat one of the purposes of the section which is aimed not only at the paraphernalia of existing gambling activities but also at materials essential to the creation of such activities. As the legislative hearings made clear, such materials are often legally fabricated and transported by persons engaged in legitimate businesses.[3] Since the purpose of Congress was to thwart the interstate movement of such paraphernalia, the accomplishment of that goal required reaching "whoever" knowingly carried such materials in interstate commerce.[4]

Appellee's next contention, earnestly supported by the State of New Hampshire as *amicus*, is based on a similar reading of the legislative intent. Appellee emphasizes the congressional desire to attack organized crime, a purpose not served by restrictions on the distribution of

[2] Thus 18 U. S. C. § 1084 is limited to persons "being engaged in the business of betting or wagering."

[3] See Hearings on H. R. 468 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 261 (testimony of Mr. Stinson for American Totalisator Co.); Hearings on S. 1653 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pp. 20 (testimony of Mr. Jacobs for Jennings & Co.), 25 (testimony of Mr. Nelson for Bally Manufacturing Co.).

[4] See, *e. g.*, Hearings on H. R. 468, *supra*, n. 3, at 26, where the Attorney General made clear that the primary purpose of the bill was to assist local enforcement of laws pertaining to gambling and like offenses; S. Rep. No. 589, 87th Cong., 1st Sess., p. 2, specified that the prohibition of the bill was "on the transportation of wagering paraphernalia" and would, without amendment, have comprehended the shipment of parimutuel equipment by legitimate business concerns.

New Hampshire Sweepstakes materials. Appellee argues that the specific exemption in § 1953 (b) of certain legal gambling enterprises from the provisions of § 1953 (a) and the limitation of § 1953 (a) itself to three types of gambling favored by organized crime reflect a congressional policy of respecting the individual gambling policies of the States and that these exemptions and limitations are merely indicative of that general policy. The New Hampshire Sweepstakes not being in existence when § 1953 was passed is necessarily exempted, so it is said, by policy rather than wording. The Government, on the other hand, contends that the specific exceptions point up the breadth of § 1953 (a) and the congressional desire to apply it except where Congress itself had carefully examined and approved exemption.

We find the Government's contention more in keeping with the language and purposes of the Act. Although at least one State had legalized gambling activities at the time the bill was passed, and the Congress was certainly aware of legal sweepstakes run by governments in other countries, Congress did not limit the coverage of the statute to "unlawful" or "illegal" activities. The sponsors of the bill made it clear that the measure as drafted was not so limited.[5] In passing 18 U. S. C. § 1084 and 18 U. S. C. § 1952 as companion provisions

[5] During the Senate Hearings Assistant Attorney General Miller, representing the Department of Justice, was specifically asked whether the bill was intended only to apply to "illegal" activities under state law. He unequivocally replied: "No sir. That proviso is not in here. It was the position of the Department that these types of paraphernalia, records, and other devices should be barred from interstate commerce." Hearings on S. 1653, *supra*, note 3, p. 294. Before the House Committee studying the bill Mr. Miller was equally explicit. He noted that the Irish Sweepstakes would be covered by the bill and soon after declared that Congress might consider a special exemption for parimutuel materials since these arose in activities legal under state law. Hearings on H. R. 468, *supra*, n. 3, p. 352.

to § 1953 Congress exempted transmission of legal gambling information from the former and limited the latter to those engaged in "unlawful activity." Thus it is reasonable to assume that Congress would have given a specific indication of exemption for state-run wagering pools if it had desired to exempt them.

Exemption would also defeat one of the principal purposes of § 1953, aiding the States in the suppression of gambling where such gambling is contrary to state policy. For example, New York prohibits the sale of lottery tickets and the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" that State regardless of the legality of the lottery in the place of drawing. N. Y. Const., Art. I, § 9, N. Y. Penal Law §§ 1373, 1382. To allow the paraphernalia of a lottery, state-operated or not, to flow freely into New York might significantly endanger that policy. It is clear that the lottery statutes apply to state-operated as well as illegal lotteries, and that § 1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in *France* v. *United States*, 164 U. S. 676, and *Francis* v. *United States*, 188 U. S. 375.[6] It would be anomalous to hold that where Congress meant to bar the lottery tickets themselves from interstate commerce it would allow the free circulation of other paraphernalia of the lottery.

Appellee's final contention raises a more troublesome problem under the Criminal Appeals Act under which this case is here. The indictment alleges the knowing interstate carriage of "records, papers and writings" and that these are "to be used, and adapted, devised and designed for use" in a forbidden activity. The Government contends that the question whether an acknowledgment can

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[6] See H. R. Rep. No. 968, 87th Cong., 1st Sess., pp. 2–3; 107 Cong. Rec. 13902 (remarks of Senator Eastland).

be, and was, so used is one of fact for the trial and not presently before this Court. In *United States* v. *Wiesenfeld Warehouse Co.*, 376 U. S. 86, 91–92, the Court dealt with a defendant's claim that a statute was not applicable to him because of his peculiar situation by stating:

> "Whatever the truth of this claim, it involves factual proof to be raised defensively at a trial on the merits. We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and reach of the statute as applied to such facts as may be developed by evidence adduced at a trial."

Here, also, we might justifiably refuse to consider appellee's contention. However, the operation of the New Hampshire Sweepstakes, while a matter of fact, is not a disputed issue and a valid question is raised as to the construction of the use requirement in § 1953. Thus this case may be considered similar to *United States* v. *Hvass*, 355 U. S. 570, where in an appeal under the Criminal Appeals Act this Court determined the question whether a district court rule was a "law of the United States" for the purposes of the perjury statute. Thus we may inquire whether an acknowledgment of purchase can, after issuance, have a use in the New Hampshire Sweepstakes.

New Hampshire Sweepstakes tickets are sold by a special machine. The customer writes a name and address on each ticket and is not restricted to purchasing for himself.[7] The owner of a ticket may be an individual who has not come to New Hampshire to make the purchase. The completed ticket is held in storage in the machine and eventually used in the drawing. The acknowledgment, practically a carbon copy of the ticket, is ejected from the machine. It need not be retained to collect a prize since all prizes are paid directly to the

[7] New Hampshire Sweepstakes Commission, New Hampshire Sweepstakes Program 5–8.

person named on the ticket, and thus appellee claims it has no use in the sweepstakes. But common sense and ordinary experience negative such a formalistic conclusion. The acknowledgment serves a significant psychological purpose by receipting the purchase and assuring the owner that his ticket is properly registered. Before this function is fulfilled by delivery of the acknowledgment to the owner of the ticket the acknowledgment remains a record, paper or writing "to be used" in the sweepstakes.[8] The Government contends that it will prove that the acknowledgments specified in this indictment were in fact being delivered to out-of-state ticket owners who had not themselves purchased their tickets in New Hampshire but had done so through Fabrizio and were thus assured of the proper completion of their purchases. We think it sufficient to hold that such a state of facts is comprehended by this indictment and within the terms of 18 U. S. C. § 1953. The constitutional power of Congress to enact the statute as we have construed it is not questioned by appellee.

The judgment of the United States District Court for the Western District of New York is reversed and the case remanded to that court for further proceedings consistent with this opinion. *It is so ordered.*

MR. JUSTICE STEWART, whom MR. JUSTICE FORTAS joins, dissenting.

For me, the key issue in this case is whether the acknowledgments of purchase that the appellee carried from New Hampshire to New York come within the

[8] See the colloquy between Assistant Attorney General Miller and Senators Keating and Kefauver reported at 293–294 of Senate Hearings on S. 1653, *supra*, n. 3. There Mr. Miller distinguished between paraphernalia which had served and exhausted its use, *e. g.*, losing tickets on a horse race, and paraphernalia whose function was not yet exhausted.

prohibition by 18 U. S. C. § 1953 (a) of interstate carriage of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in . . . wagering pools with respect to a sporting event . . . ." In the operation of New Hampshire's sweepstakes, tickets are sold through special machines, and are retained by the machines after the purchaser fills in a form provided for his name and address. After the tickets are drawn, winners are notified by telegram. The machines also provide the purchaser with an acknowledgment of purchase, which is merely a record of the purchase transaction. In order to be eligible for and to receive a prize, the purchaser of a ticket need not retain or present this purchase acknowledgment.

The Government does not contend that federal law makes it a crime for a person from another State to visit New Hampshire, purchase a sweepstakes ticket there, and return to his home. But it has argued that if a visitor to New Hampshire returns home with a receipt that merely acknowledges his personal purchase and in no way affects his eligibility to receive a prize, he has committed a crime punishable by imprisonment of up to five years.[1] Thus the Government requires us to assume that Congress has branded as felons many or most of the thousands of visitors to New Hampshire who have purchased sweepstakes tickets there. I do not believe that Congress intended such an unexpected result, which only the most abjectly literal approach to statutory interpretation could tolerate. No plausible legislative purpose would be served by the Government's construction, for when an individual takes an acknowledgment of purchase home from New Hampshire, merely retaining it as

[1] 18 U. S. C. § 1953 (a) provides that those who are convicted of a violation of the section "shall be fined not more than $10,000 or imprisoned for not more than five years or both."

a personal record of his purchase, the anti-gambling policies of other States are in no way undermined, and no opening is provided for the growth of organized racketeering.

The Court apparently shares my concern with the overbroad reach of some of the Government's contentions. For the Court's opinion stresses that the Government has informed this Court that in its proof at trial it expects to show that the appellee carried acknowledgments of purchase to New York, not to retain them as personal records of his own purchases, but to deliver them to other people in New York on whose behalf the appellee purchased tickets in New Hampshire. The Court concludes: "We think it sufficient to hold that such a state of facts is comprehended by this indictment and within the terms of 18 U. S. C. § 1953." *Ante*, at 271. I agree that if the appellee had been charged with conducting an interstate scheme for sale of sweepstakes tickets and the proof substantiated the charge, he could be validly convicted under § 1953. In such a case, the acknowledgments of purchase would be "used, or adapted . . . for use in . . . wagering pools with respect to a sporting event . . ." because they would serve the essential role of providing the ultimate purchasers with a claim against the agent who had purchased tickets in New Hampshire on their behalf. The operation of such a scheme would have the effect of extending sweepstakes sales across state lines, would undermine the anti-gambling policies of other States, and might provide fertile opportunities for racketeers.[2]

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[2] New Hampshire has enacted legislation, N. H. Rev. Stat. Ann. § 284:21–*o*, designed to deter those who seek to profit from such a scheme:

"Purchase of Tickets for a Fee Prohibited. No person shall engage in the business of purchasing or offering to purchase a sweepstakes ticket or tickets for, in behalf of, or in the name of another for a fee or service charge which shall make the ultimate cost of

However, I must emphatically disagree with the Court's conclusion that "such a state of facts is comprehended by this indictment . . . ." The indictment merely charged the appellee with interstate transport of "acknowledgements of purchase for a sweepstakes race of the State of New Hampshire" and recited the language of § 1953.[3] The Government also furnished a bill of particulars that, insofar as relevant, simply reiterated the bare charge that the appellee had carried acknowledgments of purchase across state lines.[4] These charges were consonant with the Government's broad theory that all interstate carriage of acknowledgments of purchase is prohibited, even if the acknowledgment is retained solely as a personal record of the carrier's own purchase. That interpretation of the statute, along with the indictment that embodied it, was properly rejected by the trial court.

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such ticket or tickets to the registered owner thereof greater than the legal price of such ticket or tickets as established by the sweepstakes commission under the authority of this subdivision. Whoever violates the provisions of this section shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

[3] The indictment recites, in full: "The Grand Jury charges: That on or about the 24th day of August, 1964, ANTHONY L. FABRIZIO, knowingly did carry in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, in the Western District of New York, records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U. S. C."

[4] In response to the appellee's contention that the indictment failed to state an offense, the Government's bill of particulars stated: "It is claimed by the United States that defendant knowingly carried in interstate commerce in violation of § 1953, T. 18, United States Code, 75 written acknowledgements of purchase of State of New Hampshire First Sweepstakes Race of September, 1964."

As the Court appears to concede, although the language of its opinion is not altogether clear, the appellee could be validly convicted only if he were shown to have participated in an interstate scheme for selling sweepstakes chances to persons outside New Hampshire. But no hint that the appellee was being charged with such activities appears in the indictment or bill of particulars. The charges here fell far short of the established requirement that an indictment must specify the elements of the offense intended to be charged and apprise the defendant of the case that he must be prepared to meet. See *Russell* v. *United States,* 369 U. S. 749, 760–772, and the cases discussed therein. And the Government is not entitled to enlarge the indictment now by revamping the whole theory of the prosecution and making new and additional charges against the appellee for the first time in the course of proceedings before this Court. This Court cannot remedy the deficiencies in the indictment by retroactively reading the Government's new charges into it.

We long ago rejected the notion that "it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes . . . ." *Ex parte Bain,* 121 U. S. 1, 10. See *Stirone* v. *United States,* 361 U. S. 212; *Russell* v. *United States,* 369 U. S. 749, 770–771. As the Court in *Bain* observed, "Any other doctrine would place the rights of the citizen . . . at the mercy or control of the court or prosecuting attorney . . . ." 121 U. S., at 13. The Court's opinion today ignores these established principles, and allows the appellee to be tried for a crime that he was not charged with committing.

For these reasons, I respectfully dissent.

WOODBY *v.* IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 40. Argued November 17, 1966.—Decided December 12, 1966.*

In No. 80, the Court of Appeals for the Second Circuit originally set aside a deportation order against petitioner on the ground that the Government has the burden of proving the facts supporting deportability beyond a reasonable doubt, but then reversed itself and held that the Government need only prove its case with reasonable, substantial, and probative evidence. In No. 40, the Court of Appeals for the Sixth Circuit did not explicitly deal with the burden of persuasion imposed on the Government at the administrative level, but found only that the underlying deportation order was supported by reasonable, substantial, and probative evidence on the record considered as a whole. Section 106 (a) (4) of the Immigration and Nationality Act states that a deportation order "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive," and § 242 (b) (4) of the Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *Held:* No deportation order may be entered unless the Government proves by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Pp. 282–286.

(a) Sections 106 (a) (4) and 242 (b) (4) of the Act are addressed to the scope of judicial review and not to the degree of proof required at the administrative level in deportation proceedings. Pp. 282–284.

(b) Congress has not specified the degree of proof required in deportation proceedings, a matter traditionally left to the courts to resolve. P. 284.

(c) In denaturalization and expatriation cases the Government has been required by the Court to establish its allegations by clear,

*Together with No. 80, *Sherman* v. *Immigration and Naturalization Service*, on certiorari to the United States Court of Appeals for the Second Circuit, argued on November 16–17, 1966.

unequivocal, and convincing evidence, and that burden of proof is likewise appropriate in deportation proceedings. Pp. 285–286.

No. 40, 370 F. 2d 989, and No. 80, 350 F. 2d 894, 901, judgments set aside and remanded.

Jacob A. Myers argued the cause for petitioner in No. 40. With him on the briefs was *Sidney G. Kusworm, Sr.*

Francis X. Beytagh, Jr., argued the cause for respondent in No. 40, *pro hac vice*, by special leave of Court. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Rifkind, L. Paul Winings* and *Charles Gordon.*

Joseph Forer argued the cause and filed briefs for petitioner in No. 80.

Charles Gordon argued the cause for respondent in No. 80. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Richard A. Posner* and *Maurice A. Roberts.*

Frank C. Newman, pro se, filed a brief for Newman et al., as *amici curiae*, in No. 80.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by these cases is what burden of proof the Government must sustain in deportation proceedings. We have concluded that it is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, unequivocal, and convincing evidence.

In *Sherman* (No. 80), the petitioner is a resident alien who entered this country from Poland in 1920 as a 14-year-old boy. In 1963 the Immigration and Naturalization Service instituted proceedings to deport him upon the ground that he had re-entered the United States in 1938, following a trip abroad, without inspection as an

alien.[1] After a hearing before a special inquiry officer, the petitioner was ordered to be deported, and the Board of Immigration Appeals dismissed his appeal.[2]

The Government's evidence showed that the petitioner had obtained a passport in 1937 under the name of Samuel Levine, representing himself as a United States citizen. Someone using this passport sailed to France in June 1937, proceeded to Spain, returned to the United States in December 1938, aboard the S. S. *Ausonia*, and was admitted without being examined as an alien. To establish that it was the petitioner who had traveled under this passport, the Government introduced the testimony of Edward Morrow, an American citizen who had fought in the Spanish Civil War. Morrow was at first unable to remember the name Samuel Levine or identify the petitioner, but eventually stated that he thought he had known the petitioner as "Sam Levine," had seen him while fighting for the Loyalists in Spain during 1937 and 1938, and had returned with him to the United States aboard the S. S. *Ausonia* in December 1938. Morrow conceded that his recollection of events

[1] Section 241 (a)(2) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U. S. C. § 1251 (a)(2), provides for deportation of any alien who "entered the United States without inspection or at any time or place other than as designated by the Attorney General . . . ." Prior to 1952, the Government was required to bring deportation proceedings within five years of an alleged illegal entry, 39 Stat. 889 (1917), as amended, 8 U. S. C. § 155 (a) (1946 ed.). Thus, under the prior law, the petitioner would not have been subject to deportation proceedings commenced after 1943. However, this time limit was retroactively eliminated by the 1952 Act, § 241 (d), 66 Stat. 208, 8 U. S. C. § 1251 (d). See Developments in the Law, Immigration and Nationality, 66 Harv. L. Rev. 643, 683–684.

[2] In conformity with its usual practice, the Board made its own independent determination of the factual issues after *de novo* examination of the record. See Gordon & Rosenfield, Immigration Law and Procedure 46–47 (1959).

occurring 27 years earlier was imperfect, and admitted that his identification of the petitioner might be mistaken.

It is not clear what standard of proof the special inquiry officer and the Board of Immigration Appeals on *de novo* review applied in determining that it was the petitioner who had traveled to Spain and re-entered the United States under the Samuel Levine passport. At the outset of his opinion, the special inquiry officer stated that the Government must establish deportability "by reasonable, substantial and probative evidence," without discussing what the burden of proof was. Later he concluded that the Government had established its contentions "with a solidarity far greater than required," but did not further elucidate what was "required." The Board of Immigration Appeals stated that it was "established beyond any reasonable doubt" that the petitioner had obtained the Samuel Levine passport, and added that this established a "presumption" that the petitioner had used it to travel abroad. The Board further stated that it was a "most unlikely hypothesis" that someone other than the petitioner had obtained and used the passport, and asserted that "the Service has borne its burden of establishing" that the petitioner was deportable, without indicating what it considered the weight of that burden to be.

Upon petition for review, the Court of Appeals for the Second Circuit originally set aside the deportation order, upon the ground that the Government has the burden of proving the facts supporting deportability beyond a reasonable doubt.[3] The court reversed itself, however, upon a rehearing *en banc*, holding that the Government need only prove its case with "reasonable, substantial,

[3] 350 F. 2d 894.

and probative evidence." [4] We granted certiorari, 384 U. S. 904.

In *Woodby* (No. 40), the petitioner is a resident alien who was born in Hungary and entered the United States from Germany in 1956 as the wife of an American soldier. Deportation proceedings were instituted against her on the ground that she had engaged in prostitution after entry.[5] A special inquiry officer and the Board of Immigration Appeals found that she was deportable upon the ground charged.

At the administrative hearing the petitioner admitted that she had engaged in prostitution for a brief period in 1957, some months after her husband had deserted her, but claimed that her conduct was the product of circumstances amounting to duress. Without reaching the validity of the duress defense, the special inquiry officer and the Board of Immigration Appeals concluded that the petitioner had continued to engage in prostitution after the alleged duress had terminated. The hearing officer and the Board did not discuss what burden of proof the Government was required to bear in establishing deportability, nor did either of them indicate the degree of certainty with which their factual conclusions were reached. The special inquiry officer merely asserted that the evidence demonstrated that the petitioner was

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[4] 350 F. 2d, at 901. The court adopted the reasoning of the opinion which Judge Friendly had filed as a dissent to the original decision. Judges Waterman and Smith, who had formed the original majority, dissented.

[5] Section 241 (a)(12) of the Immigration and Nationality Act of 1952, 66 Stat. 207, 8 U. S. C. § 1251 (a)(12), provides for the deportation of any alien who "by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a) . . . ." Among the classes specified in § 212 (a)(12) of the Act, 66 Stat. 182, 8 U. S. C. § 1182 (a)(12), are "Aliens who are prostitutes or who have engaged in prostitution. . . ."

deportable. The Board stated that the evidence made it "apparent" that the petitioner had engaged in prostitution after the alleged duress had ended, and announced that "it is concluded that the evidence establishes deportability . . . ."

In denying a petition for review, the Court of Appeals for the Sixth Circuit did not explicitly deal with the issue of what burden of persuasion was imposed upon the Government at the administrative level, finding only that "the Board's underlying order is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole . . . .'" We granted certiorari, 384 U. S. 904.

In the prevailing opinion in the *Sherman* case, the Court of Appeals for the Second Circuit stated that "[i]f the slate were clean," it "might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail. . . . But here," the court thought, "Congress has spoken . . . ." 350 F. 2d, at 900. This view was based upon two provisions of the Immigration and Nationality Act which use the language "reasonable, substantial, and probative evidence" in connection with deportation orders. The provisions in question are § 106 (a)(4) of the Act which states that a deportation order, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive," [6] and § 242 (b)(4) of the Act which provides *inter alia* that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." [7]

[6] 75 Stat. 651 (1961), 8 U. S. C. § 1105a (a)(4).

[7] 66 Stat. 210 (1952), 8 U. S. C. § 1252 (b)(4).

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It seems clear, however, that these two statutory provisions are addressed not to the degree of proof required at the administrative level in deportation proceedings, but to quite a different subject—the scope of judicial review. The elementary but crucial difference between burden of proof and scope of review is, of course, a commonplace in the law.[8] The difference is most graphically illustrated in a criminal case. There the prosecution is generally required to prove the elements of the offense beyond a reasonable doubt.[9] But if the correct burden of proof was imposed at the trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment is supported by substantial evidence.[10]

That § 106 (a)(4) relates exclusively to judicial review is made abundantly clear by its language, its context, and its legislative history. Section 106 was added to the Act in 1961 in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States."[11] The section is entitled "Judicial Review of

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[8] See Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914 (1966); Comment, 41 N. Y. U. L. Rev. 622 (1966); Standard of Proof in Deportation Proceedings, 18 Stan. L. Rev. 1237 (1966).

[9] See McCormick, Evidence 681–685 (1954); 9 Wigmore, Evidence § 2497 (3d ed. 1940).

[10] *E. g., Rutkin* v. *United States*, 343 U. S. 130, 135. For discussion of variations of and alternatives to the usual rule, see Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1157–1163 (1960).

[11] H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22.

Orders of Deportation and Exclusion," and by its terms provides "the sole and exclusive procedure for" the "judicial review of all final orders of deportation." Subsection 106 (a)(4) is a specific directive to the courts in which petitions for review are filed.[12]

It is hardly less clear that the other provision upon which the Court of Appeals for the Second Circuit relied, § 242 (b)(4) of the Act, is also addressed to reviewing courts, and, insofar as it represents a yardstick for the administrative factfinder, goes, not to the burden of proof, but rather to the quality and nature of the evidence upon which a deportation order must be based.[13] The provision declares that "reasonable, substantial, and probative evidence" shall be the measure of whether a deportability decision is "valid"—a word that implies scrutiny by a reviewing tribunal of a decision already reached by the trier of the facts. The location of this

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[12] "Judicial Review of Orders of Deportation and Exclusion

"SEC. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . except that—

. . . . . .

"(4) . . . the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive . . . ." 75 Stat. 651 (1961), 8 U. S. C. § 1105a (a).

[13] This has been recognized by the Board of Immigration Appeals itself:

"Finally, it is important to bear in mind the distinction between the burden of proof and the quality of the evidence which is required to establish that burden successfully. It is to be noted that subsection (b)(4) of section 242 of the act does not speak of the burden of proof but of the quality of the evidence which the Service must produce before deportability can validly be found. . . ." *Matter of V—*, 7 I. & N. Dec. 460, 463.

provision in a section containing provisions dealing with procedures before the special inquiry officer has little significance when it is remembered that the original 1952 Act did not itself contain a framework for judicial review—although such review was, of course, available by habeas corpus or otherwise. See *Marcello* v. *Bonds*, 349 U. S. 302. And whatever ambiguity might be thought to lie in the location of this section is resolved by its legislative history. The Senate Report explained § 242 (b)(4) as follows: "The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that of the administrative body." [14]

We conclude, therefore, that Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings. It is the kind of question which has traditionally been left to the judiciary to resolve,[15] and its resolution is necessary in the interest of the evenhanded administration of the Immigration and Nationality Act.

The petitioners urge that the appropriate burden of proof in deportation proceedings should be that which the law imposes in criminal cases—the duty of proving the essential facts beyond a reasonable doubt. The Government, on the other hand, points out that a deporta-

[14] S. Rep. No. 1137, 82d Cong., 2d Sess., 30. The House Report contains substantially identical language. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 57.

[15] See McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944). See also 9 Wigmore, Evidence §§ 2488–2493, 2497–2498 (3d ed. 1940).

tion proceeding is not a criminal case, and that the appropriate burden of proof should consequently be the one generally imposed in civil cases and administrative proceedings—the duty of prevailing by a mere preponderance of the evidence.

To be sure, a deportation proceeding is not a criminal prosecution. *Harisiades* v. *Shaughnessy*, 342 U. S. 580. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years . . . ." *Rowoldt* v. *Perfetto*, 355 U. S. 115, 120.

In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence.[16] The same burden has been imposed in expatriation cases.[17] That standard of proof is no stranger to the civil law.[18]

[16] *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *Nowak* v. *United States*, 356 U. S. 660; *Chaunt* v. *United States*, 364 U. S. 350.

[17] *Gonzales* v. *Landon*, 350 U. S. 920; *Nishikawa* v. *Dulles*, 356 U. S. 129. But see § 349 (c) of the Immigration and Nationality Act, 75 Stat. 656 (1961), 8 U. S. C. § 1481 (c).

[18] This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. See 9 Wigmore, Evidence § 2498 (3d ed. 1940).

No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.

We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.[19] Accordingly, in each of the cases before us, the judgment of the Court of Appeals is set aside, and the case is remanded with directions to remand to the Immigration and Naturalization Service for such further proceedings as, consistent with this opinion, may be deemed appropriate.[20]

It is so ordered.

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[19] This standard of proof applies to all deportation cases, regardless of the length of time the alien has resided in this country. It is perhaps worth pointing out, however, that, as a practical matter, the more recent the alleged events supporting deportability, the more readily the Government will generally be able to prove its allegations by clear, unequivocal, and convincing evidence.

[20] Section 106 (a)(1) of the Act, 75 Stat. 651 (1961), 8 U. S. C. § 1105a (a)(1), provides that a petition for judicial review must be filed with the Court of Appeals not later than six months after a final order of deportation. In No. 40, *Woodby*, the petitioner's appeal to the Board of Immigration Appeals was dismissed on March 8, 1963, and a motion for reconsideration was denied on May 27, 1963. Petition for review by the Court of Appeals was filed more than six months after the Board upheld the deportation order, but within six months after the denial of the motion to reconsider. The Court of Appeals did not pass on the question whether, in such circumstances, its power of review was limited to consideration whether the denial of the motion for reconsideration was an abuse of discretion, or whether it might also assess in full the validity of the deportation order. Following the decision of the Court of

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court, by placing a higher standard of proof on the Government, in deportation cases, has usurped the legislative function of the Congress and has in one fell swoop repealed the long-established "reasonable, substantial, and probative" burden of proof placed on the Government by specific Act of the Congress, and substituted its own "clear, unequivocal, and convincing" standard. This is but another case in a long line in which the Court has tightened the noose around the Government's neck in immigration cases.

I.

I agree that § 106 (a)(4), the 1961 amendment to the Immigration and Nationality Act of 1952, relates to judicial review of administrative orders of the Immigration Service but, with due deference, I cannot see how "It is hardly less clear" that § 242 (b)(4) of the Act, as the Court says, likewise applies exclusively to judicial review. Indeed, on the contrary, the latter section was specifically enacted as the only standard of proof to be applied in deportation cases.

Before § 242 (b) was enacted the immigration laws contained no detailed provision concerning the burden of proof in deportation cases. *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939). In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), this Court extended the provisions

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Appeals in this case, the Court of Appeals for the Ninth Circuit held, in similar circumstances, that it had authority to undertake full review of the deportation order, as well as the denial of the motion to reconsider. *Bregman* v. *Immigration and Naturalization Service*, 351 F. 2d 401. In light of the *Bregman* decision, the Government before this Court expressly abandoned its contention that in this case the courts are limited to reviewing the denial of the motion to reconsider. See the Government's brief in No. 40, *Woodby*, p. 8, n. 3.

of the Administrative Procedure Act to deportation proceedings. Congress immediately exempted such proceedings from the Administrative Procedure Act and in 1952 established in § 242 (b) an exclusive procedural system for deportation proceedings.

In essence that section, § 242 (b), provides for notice and a hearing before a "special inquiry officer" of the Immigration Service; sets the standard of proof in such cases as "reasonable, substantial, and probative evidence"; and authorizes the Attorney General to issue regulations. In issuing those regulations the Attorney General established a Board of Immigration Appeals. The Board's relationship to the orders of the special inquiry officer is similar to the relationship an agency has to the orders of a hearing examiner under the Administrative Procedure Act. The section also specifically provides that the regulations shall include requirements that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence" and that this standard shall be the "sole and exclusive procedure for determining the deportability of an alien under this section." This was the first time in our history that Congress had expressly placed a specific standard of proof on the Government in deportation cases. And the language Congress used made it clear that this standard related to the "burden of proof" as well as "the quality and nature of the evidence." The requirement of "reasonable" evidence cannot be meant merely to exclude "unreasonable" or "irrational" evidence but carries the obvious connotation from history and tradition of sufficiency to sustain a conclusion by a preponderance of the evidence.[1] Congress in overruling *Wong Yang Sung*,

[1] Thus the judicial review provision of the Administrative Procedure Act, 5 U. S. C. § 1009 (e)(5), limits the scope of review to a determination of support by "substantial evidence," and 5 U. S. C. § 1006 limits the agencies to acting on "reliable, probative, and

supra, carved deportation proceedings from the judicial overtones of the Administrative Procedure Act and established a *built-in* administrative procedure.

This is made crystal clear by the reports of both Houses of Congress on § 242 (b). The Committee Reports, S. Rep. No. 1137, 82d Cong., 2d Sess., 30; H. R. Rep. No. 1365, 82d Cong., 2d Sess., 57, state in simple, understandable language that:

> "The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below."

The courts consistently applied the standard of "reasonable, substantial and probative" evidence after the adoption of § 242 (b). See, *e. g., Rowoldt* v. *Perfetto,* 355 U. S. 115, 120–121 (1957).

The Court, however, in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), once again extended the Administrative Procedure Act's provision respecting judicial review to deportation cases. The reaction of the Congress was identical to that of 1952 when it overruled *Wong Yang Sung, supra.* It enacted, in 1961, § 106 (a)(4) of the Act. Just as § 242 (b) was the first statutory standard of proof, § 106 (a)(4) was the first express statutory standard of judicial review. It provided:

> ". . . the petition [for review] shall be determined solely upon the administrative record upon which the deportation order is based and the Attor-

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substantial evidence." This pattern has traditionally been held satisfied when the agency decides on the preponderance of the evidence.

ney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

Why Congress passed § 106 (a)(4) if judicial review, as the Court holds, was already exclusively covered by § 242 (b) is beyond my comprehension—unless it was engaged in shadow boxing. I cannot believe that it was.

The Court says that both the special inquiry officer and the Board of Immigration Appeals failed to state what the burden of proof was in these cases. Fault is found in the officer's use of the phrase "solidarity" of proof "far greater than required." This language was apparently patterned after this Court's opinion in *Rowoldt, supra,* where the phrase "solidity of proof" was used. The findings of both the officers and the Board in these cases show specifically that the burden of proof followed in each case was that required of the Government in § 242 (b) and the Regulations of the Attorney General, *i. e.,* by "reasonable, substantial, and probative evidence." This standard has been administratively followed by the Immigration Service in a long and unbroken line of cases. See *Matter of Peralta,* 10 I. & N. Dec. 43, 46.

The Court now extends the standard of *Schneiderman* v. *United States,* 320 U. S. 118 (1943), in denaturalization cases, *i. e.,* "clear, unequivocal, and convincing evidence," to deportation cases. But denaturalization and expatriation are much more oppressive cases than deportation. They deprive one of citizenship which the United States had previously conferred. The *Schneiderman* rule only follows the principle that vested rights can be canceled only upon clear, unequivocal, and convincing proof; it gives stability and finality to a most precious right—citizenship. An alien, however, does not enjoy citizenship but only a conditional privilege extended to him by the Congress as a matter of grace. Both

petitioners, the record shows, knew this, yet they remained in this country for years—46 in the case of Sherman and 10 in that of Woodby. Still, neither made any effort to obtain citizenship.

II.

By treating these two cases as raising only a single issue the Court ignores some aspects of *Woodby* which greatly trouble me. Woodby sought review of the final deportation order against her more than six months after entry of that order. Section 106 (a)(1) of the Act specifically limits the jurisdiction of the Court of Appeals to consideration of petitions for review "filed not later than six months from the date of the final deportation order." The legislative history of that provision makes it clear that Congress intended it to be strictly enforced in order to alleviate the spectacle of aliens subject to deportation orders and able to remain in this country for long periods of time by employing dilatory legal tactics. See H. R. Rep. No. 565, 87th Cong., 1st Sess. Since there is no time limit on petitions for rehearing or reconsideration, 8 CFR §§ 242.22, 103.5, permitting review of a final order of deportation merely because a timely petition for review of an administrative refusal to reopen the proceedings has been filed would negate the congressional purpose behind the insistence on timely filing in § 106 (a)(1). *Lopez* v. *U. S. Department of Justice*, 356 F. 2d 986, cert. denied, *post*, p. 839.[2]

[2] In *Giova* v. *Rosenberg*, 379 U. S. 18, this Court held only that denial of a petition to reopen or reconsider is reviewable. The Court did not specify the scope of review to be applied. The Court may be depending upon a concession by the Government on this point, but it is clear that jurisdiction cannot be waived. *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Good Shot* v. *United States*, 179 U. S. 87.

The Court holds only that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged *as grounds for deportation* are true." (Italics added.) The ground alleged for deportation of Woodby was that she had "engaged in prostitution after entry." It has never been contended that this ground was not properly established. In fact it is conceded that Woodby engaged in prostitution. The only factual dispute involved in her case centers on the question whether her activities arose from duress and ended when the conditions compelling her to stray ceased to exist. It seems clear to me that since Woodby is raising duress as an affirmative defense she bears the burden of establishing all elements of that defense. See *Matter of M—*, 7 I. & N. Dec. 251. And the record clearly shows that both the administrative authorities and the Court of Appeals rejected Woodby's "bizarre" story. Under familiar principles those findings are binding on this Court, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, and nothing in what the Court holds today affects that conclusion.

I regret that my powers of persuasion with my Brethren are not sufficient to prevent this encroachment upon the function of the Congress which will place an undue and unintended burden upon the Government in deportation cases. I dissent.

HOFFA *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 32. Argued October 13, 1966.—Decided December 12, 1966.*

Petitioners were convicted under 18 U. S. C. § 1503 for endeavoring to bribe members of a jury in a previous trial of petitioner Hoffa, for violating the Taft-Hartley Act, which resulted in a hung jury. Substantial information and evidence were given in the prosecution by Partin, a paid government informer, who throughout the Taft-Hartley trial was repeatedly in Hoffa's company—in Hoffa's hotel suite, the hotel lobby, and elsewhere. The Court of Appeals affirmed the convictions, and this Court granted certiorari on the question whether the use of evidence furnished by the informer rendered the convictions invalid. *Held:*

1. No rights under the Fourth Amendment were violated by the failure of Partin to disclose his role as a government informer. When Hoffa made incriminating statements to or in the presence of Partin, his invitee, he relied, not on the security of the hotel room, but on his misplaced confidence that Partin would not reveal his wrongdoing. Pp. 300–303.

2. Hoffa's conversations with Partin, being entirely voluntary, involved no Fifth Amendment privilege against compulsory self-incrimination. Pp. 303–304.

3. There was no violation of any Sixth Amendment right to counsel in this case. Pp. 304–310.

(a) A Sixth Amendment violation resulting from Partin's reporting to the Government on the activities of Hoffa's counsel in preparing the defense of the Taft-Hartley trial might have invalidated any conviction in that trial. But the conviction in the subsequent trial for the different offense of endeavoring to bribe jurors was not rendered invalid by the admission of Hoffa's incriminating statements heard by Partin, none of which were made in the presence of counsel or in connection with the legitimate defense of the Taft-Hartley trial. *Caldwell* v. *United States,*

*Together with No. 33, *Parks* v. *United States,* No. 34, *Campbell* v. *United States,* and No. 35, *King* v. *United States,* also on certiorari to the same court.

92 U. S. App. D. C. 355, 205 F. 2d 879; *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749, distinguished. Pp. 306–309.

(b) The Government was not obliged to arrest Hoffa when it first had probable cause to do so, though his admissions without counsel after arrest might have been barred, since law enforcement officers have no duty to halt a crime investigation when they have minimum evidence to establish probable cause. Pp. 309–310.

4. The use of a secret informer is not *per se* unconstitutional, and the use of Partin in this case did not violate due process requirements, his veracity having been fully subject to the safeguards of cross-examination and the trial court's instructions to the jury. Pp. 310–312.

349 F. 2d 20, affirmed.

Joseph A. Fanelli argued the cause for petitioners in all cases. With him on the briefs were *Morris A. Shenker, Daniel B. Maher, Jacques M. Schiffer, Cecil D. Branstetter, P. D. Maktos* and *Harold E. Brown.*

Assistant Attorney General Vinson and *Nathan Lewin* argued the cause for the United States in all cases. With them on the brief were *Solicitor General Marshall* and *Philip R. Monahan.*

Briefs of *amici curiae,* urging reversal in No. 32, were filed by *Morris Lavine* for the Criminal Courts Bar Association of Los Angeles County, and by *Osmond K. Fraenkel* for the American Civil Liberties Union.

MR. JUSTICE STEWART delivered the opinion of the Court.

Over a period of several weeks in the late autumn of 1962 there took place in a federal court in Nashville, Tennessee, a trial by jury in which James Hoffa was charged with violating a provision of the Taft-Hartley Act. That trial, known in the present record as the Test Fleet trial, ended with a hung jury. The petitioners now before us—James Hoffa, Thomas Parks, Larry Campbell, and Ewing King—were tried and convicted

in 1964 for endeavoring to bribe members of that jury.[1] The convictions were affirmed by the Court of Appeals.[2] A substantial element in the Government's proof that led to the convictions of these four petitioners was contributed by a witness named Edward Partin, who testified to several incriminating statements which he said petitioners Hoffa and King had made in his presence during the course of the Test Fleet trial. Our grant of certiorari was limited to the single issue of whether the Government's use in this case of evidence supplied by Partin operated to invalidate these convictions. 382 U. S. 1024.

The specific question before us, as framed by counsel for the petitioners, is this:

> "Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge."

At the threshold the Government takes issue with the way this question is worded, refusing to concede that it " 'placed' the informer anywhere, much less that it did so 'deceptively.' " In the view we take of the matter, however, a resolution of this verbal controversy is unnecessary to a decision of the constitutional issues before us. The basic facts are clear enough, and a lengthy discussion of the detailed minutiae to which a large portion of the briefs and oral arguments was addressed would serve only to divert attention from the real issues before us.

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[1] Petitioners Hoffa, Parks, and Campbell were convicted under 18 U. S. C. § 1503 for endeavoring corruptly to influence Test Fleet juror Gratin Fields. Petitioners Hoffa and King were convicted of a similar offense involving Test Fleet juror Mrs. James M. Paschal.

[2] 349 F. 2d 20.

The controlling facts can be briefly stated. The Test Fleet trial, in which James Hoffa was the sole individual defendant, was in progress between October 22 and December 23, 1962, in Nashville, Tennessee. James Hoffa was president of the International Brotherhood of Teamsters. During the course of the trial he occupied a three-room suite in the Andrew Jackson Hotel in Nashville. One of his constant companions throughout the trial was the petitioner King, president of the Nashville local of the Teamsters Union. Edward Partin, a resident of Baton Rouge, Louisiana, and a local Teamsters Union official there, made repeated visits to Nashville during the period of the trial. On these visits he frequented the Hoffa hotel suite, and was continually in the company of Hoffa and his associates, including King, in and around the hotel suite, the hotel lobby, the courthouse, and elsewhere in Nashville. During this period Partin made frequent reports to a federal agent named Sheridan concerning conversations he said Hoffa and King had had with him and with each other, disclosing endeavors to bribe members of the Test Fleet jury. Partin's reports and his subsequent testimony at the petitioners' trial unquestionably contributed, directly or indirectly, to the convictions of all four of the petitioners.[3]

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[3] Partin testified at the trial of this case that petitioners Hoffa and King had made the following statements during the course of the Test Fleet trial:

On October 22, the day Partin first arrived in Nashville, King told him that a meeting had been "set up on the jury that night." That evening Hoffa told Partin that he wanted Partin to stay in Nashville in order to call on some people. Hoffa explained "that they was going to get to one juror or try to get to a few scattered jurors and take their chances." The next day Partin was told by Hoffa that Hoffa might want him "to pass something for him." As Hoffa said this, he hit his rear pocket with his hand. On October 25, the day after Test Fleet juror James Tippens had reported to the trial judge that he had been approached with a bribe offer,

The chain of circumstances which led Partin to be in Nashville during the Test Fleet trial extended back at least to September of 1962. At that time Partin was in jail in Baton Rouge on a state criminal charge. He was

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Partin asked Hoffa about his wanting Partin to "pass something." Hoffa replied, "The dirty bastards went in and told the Judge that his neighbor had offered him $10,000," and added, "We are going to have to lay low for a few days." King told Partin on October 26 that he intended to influence a female juror, Mrs. Paschal, in Hoffa's favor, and added that the juror and her husband, a highway patrolman, "loved money, and $10,000.00 [is] a lot of money." Hoffa informed Partin on October 29 that he "would pay 15 or $20,000, whatever—whatever it cost to get to the jury." On November 5, in Partin's presence, Hoffa berated King for failing in his promises to "get the patrolman." King then told Partin that he was arranging a meeting with the highway patrolman, but on November 7 King admitted to Partin that he had not yet contacted the highway patrolman and that Hoffa had been complaining "about not getting to the jury." Hoffa criticized King in the presence of Partin on November 14 for "not making a contact like he told him he would," adding that he "wanted some insurance." Later the same day, King told Partin that he had arranged to meet with the highway patrolman, and that he had prepared a cover story to allay suspicion. On November 15 Hoffa asked King in Partin's presence whether he had "made the contacts." King related to Partin on November 20 a meeting that King had had with juror Paschal's husband, stating that the highway patrolman wanted a promotion rather than money. The same day Hoffa told Partin that he was disturbed because "the Highway Patrolman wouldn't take the money," adding that if he had "taken the money it would have pinned him down and he couldn't have backed up."

There was other evidence at the trial that petitioner Campbell, a union associate of Hoffa's, and petitioner Parks, Campbell's uncle, had made bribe offers to Gratin Fields, a Negro juror. On November 7, according to Partin, Hoffa told Partin that he had "the colored male juror in [his] hip pocket," and that Campbell "took care of it." Hoffa told Partin that Campbell, a Negro, was related to Fields, and that while Fields had refused the bribe he would not "go against his own people." Hoffa concluded, "[I]t looks like our best bet is a hung jury unless we can get to the foreman of the jury. If they have a hung jury, it will be the same as acquittal because they will never try the case again."

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also under a federal indictment for embezzling union funds, and other indictments for state offenses were pending against him. Between that time and Partin's initial visit to Nashville on October 22 he was released on bail on the state criminal charge, and proceedings under the federal indictment were postponed. On October 8, Partin telephoned Hoffa in Washington, D. C., to discuss local union matters and Partin's difficulties with the authorities. In the course of this conversation Partin asked if he could see Hoffa to confer about these problems, and Hoffa acquiesced. Partin again called Hoffa on October 18 and arranged to meet him in Nashville. During this period Partin also consulted on several occasions with federal law enforcement agents, who told him that Hoffa might attempt to tamper with the Test Fleet jury, and asked him to be on the lookout in Nashville for such attempts and to report to the federal authorities any evidence of wrongdoing that he discovered. Partin agreed to do so.

After the Test Fleet trial was completed, Partin's wife received four monthly installment payments of $300 from government funds, and the state and federal charges against Partin were either dropped or not actively pursued.

Reviewing these circumstances in detail, the Government insists the fair inference is that Partin went to Nashville on his own initiative to discuss union business and his own problems with Hoffa, that Partin ultimately cooperated closely with federal authorities only after he discovered evidence of jury tampering in the Test Fleet trial, that the payments to Partin's wife were simply in partial reimbursement of Partin's subsequent out-of-pocket expenses, and that the failure to prosecute Partin on the state and federal charges had no necessary connection with his services as an informer. The findings of the trial court support this version of the

facts,[4] and these findings were accepted by the Court of Appeals as "supported by substantial evidence." 349 F. 2d, at 36. But whether or not the Government "placed" Partin with Hoffa in Nashville during the Test Fleet trial, we proceed upon the premise that Partin was a government informer from the time he first arrived in Nashville on October 22, and that the Government compensated him for his services as such. It is upon that premise that we consider the constitutional issues presented.

Before turning to those issues we mention an additional preliminary contention of the Government. The

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[4] In denying the defense motion to suppress Partin's testimony, the trial court stated: "I would further find that the government did not place this witness Mr. Partin in the defendants' midst or have anything to do with placing him in their midst, rather that he was knowingly and voluntarily placed in their midst by one of the defendants."

The trial court's memorandum denying a motion for a new trial contained the following statement:

"The action of the Court in denying the motions of the defendants to suppress the testimony of the witness Partin is complained of in Grounds 41 and 42 of the motions for new trial. It is contended that one of the findings of fact of the Court with respect to the motion to suppress was rendered incorrect by subsequent evidence in the case. It is contended that the telephone transcriptions of the telephone calls between Partin and Hoffa on October 8 and 18, 1962, established that the defendant Hoffa did not invite Partin to Nashville. The telephone transcriptions reflect that the defendant Hoffa agreed to an appointment to see Partin in Nashville. Even if the defendant Hoffa did not initiate the invitation of Partin to come to Nashville, but rather Partin solicited the invitation, this does not in any way alter the Court's finding that the Government did not place or keep Partin with the defendant Hoffa. . . . The Government requested of Partin only that he report information of jury tampering or other illegal activity of which he became aware. Partin voluntarily furnished such information. He remained in Nashville or returned to Nashville either at the request or with the consent of the defendant Hoffa and not at the instruction of the Government."

petitioner Hoffa was the only individual defendant in the Test Fleet case, and Partin had conversations during the Test Fleet trial only with him and with the petitioner King. So far as appears, Partin never saw either of the other two petitioners during that period. Consequently, the Government argues that, of the four petitioners, only Hoffa has standing to raise a claim that his Sixth Amendment right to counsel in the Test Fleet trial was impaired, and only he and King have standing with respect to the other constitutional claims. Cf. *Wong Sun* v. *United States*, 371 U. S. 471, 487–488, 491–492; *Jones* v. *United States*, 362 U. S. 257, 259–267. It is clear, on the other hand, that Partin's reports to the agent Sheridan uncovered leads that made possible the development of evidence against petitioners Parks and Campbell. But we need not pursue the nuances of these "standing" questions, because it is evident in any event that none of the petitioners can prevail unless the petitioner Hoffa prevails. For that reason, the ensuing discussion is confined to the claims of the petitioner Hoffa (hereinafter petitioner), all of which he clearly has standing to invoke.

I.

It is contended that only by violating the petitioner's rights under the Fourth Amendment was Partin able to hear the petitioner's incriminating statements in the hotel suite, and that Partin's testimony was therefore inadmissible under the exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383. The argument is that Partin's failure to disclose his role as a government informer vitiated the consent that the petitioner gave to Partin's repeated entries into the suite, and that by listening to the petitioner's statements Partin conducted an illegal "search" for verbal evidence.

The preliminary steps of this argument are on solid ground. A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office. *United States* v. *Jeffers*, 342 U. S. 48. The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. *Gouled* v. *United States*, 255 U. S. 298. And the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements. *Silverman* v. *United States*, 365 U. S. 505.

Where the argument falls is in its misapprehension of the fundamental nature and scope of Fourth Amendment protection. What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile.[5] There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in *Jeffers*, the purloining of the petitioner's private papers in *Gouled*, or the surreptitious electronic surveillance in *Silverman*. Countless other cases which have come to this Court over the years have involved a myriad of differing factual contexts in which the protections of the Fourth Amendment have been appropriately invoked. No doubt the future will bring countless others. By nothing we say here do we either foresee or foreclose factual

[5] We do not deal here with the law of arrest under the Fourth Amendment.

situations to which the Fourth Amendment may be applicable.

In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.[6] As counsel for the petitioner himself points out, some of the communications with Partin did not take place in the suite at all, but in the "hall of the hotel," in the "Andrew Jackson Hotel lobby," and "at the courthouse."

Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in *Lopez* v. *United States*, 373 U. S. 427. In that case the petitioner had been convicted of attempted bribery of an internal revenue agent named Davis. The Court was divided with regard to the admissibility in evidence of a surreptitious electronic recording of an incriminating conversation Lopez had had in his private office with Davis. But there was no dissent from the view that testimony

[6] The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide. Cf. *Lewis* v. *United States*, *ante*, p. 206.

about the conversation by Davis himself was clearly admissible.

As the Court put it, "Davis was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare *Wong Sun* v. *United States*, 371 U. S. 471. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled* v. *United States, supra.* The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. . . ." 373 U. S., at 438. In the words of the dissenting opinion in *Lopez*, "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Id.*, at 465. See also *Lewis* v. *United States, ante*, p. 206.

Adhering to these views, we hold that no right protected by the Fourth Amendment was violated in the present case.

II.

The petitioner argues that his right under the Fifth Amendment not to "be compelled in any criminal case to be a witness against himself" was violated by the admission of Partin's testimony. The claim is without merit.

There have been sharply differing views within the Court as to the ultimate reach of the Fifth Amendment right against compulsory self-incrimination. Some of those differences were aired last Term in *Miranda* v. *Arizona*, 384 U. S. 436, 499, 504, 526. But since at least as long ago as 1807, when Chief Justice Marshall first

gave attention to the matter in the trial of Aaron Burr,[7] all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. Thus, in the *Miranda* case, dealing with the Fifth Amendment's impact upon police interrogation of persons in custody, the Court predicated its decision upon the conclusion "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. . . ." 384 U. S., at 467.

In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case.

III.

The petitioner makes two separate claims under the Sixth Amendment, and we give them separate consideration.

A.

During the course of the Test Fleet trial the petitioner's lawyers used his suite as a place to confer with him and with each other, to interview witnesses, and to plan the following day's trial strategy. Therefore,

[7] "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is *compellable* to furnish any one of them against himself. . . ." *In re Willie*, 25 Fed. Cas. 38, 40 (No. 14,692e) (C. C. D. Va. 1807). (Emphasis supplied.)

argues the petitioner, Partin's presence in and around the suite violated the petitioner's Sixth Amendment right to counsel, because an essential ingredient thereof is the right of a defendant and his counsel to prepare for trial without intrusion upon their confidential relationship by an agent of the Government, the defendant's trial adversary. Since Partin's presence in the suite thus violated the Sixth Amendment, the argument continues, any evidence acquired by reason of his presence there was constitutionally tainted and therefore inadmissible against the petitioner in this case. We reject this argument.

In the first place, it is far from clear to what extent Partin was present at conversations or conferences of the petitioner's counsel. Several of the petitioner's Test Fleet lawyers testified at the hearing on the motion to suppress Partin's testimony in the present case. Most of them said that Partin had heard or had been in a position to hear at least some of the lawyers' discussions during the Test Fleet trial. On the other hand, Partin himself testified that the lawyers "would move you out" when they wanted to discuss the case, and denied that he made any effort to "get into or be present at any conversations between lawyers or anything of that sort," other than engaging in such banalities as "how things looked," or "how does it look?" He said he might have heard some of the lawyers' conversations, but he didn't know what they were talking about, "because I wasn't interested in what they had to say about the case." He testified that he did not report any of the lawyers' conversations to Sheridan, because the latter "wasn't interested in what the attorneys said." Partin's testimony was largely confirmed by Sheridan. Sheridan did testify, however, to one occasion when Partin told him about a group of prospective character witnesses being interviewed in the suite by one of the petitioner's lawyers, who "was going

over" some written "questions and answers" with them. This information was evidently relayed by Sheridan to the chief government attorney at the Test Fleet trial.[8]

The District Court in the present case apparently credited Partin's testimony, finding "there has been no interference by the government with any attorney-client relationship of any defendant in this case." The Court of Appeals accepted this finding. 349 F. 2d, at 36. In view of Sheridan's testimony about Partin's report of the interviews with the prospective character witnesses, however, we proceed here on the hypothesis that Partin did observe and report to Sheridan at least some of the activities of defense counsel in the Test Fleet trial.

The proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression in two cases decided by the Court of Appeals for the District of Columbia Circuit, *Caldwell* v. *United States*, 92 U. S. App. D. C. 355, 205 F. 2d 879, and *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749. Both of those cases dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel. In *Coplon*, the

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[8] Petitioner maintains that the cross-examination of one of these character witnesses at the Test Fleet trial shows that the prosecution availed itself of the information transmitted by Partin. The following exchange between the prosecutor and witness occurred:

Q. "Did [defense counsel] give you anything to read, Mr. Sammut?"

A. "No, sir, not even a newspaper."

Q. "Not even a newspaper? I am not talking about newspapers, I am talking with respect to your testimony. Did they give you anything to read with respect to your testimony?"

A. "After I talked to them."

Q. "They gave you written questions and answers, didn't they?"

A. "The questions that they asked me and the questions that I answered."

defendant alleged that government agents deliberately intercepted telephone consultations between the defendant and her lawyer before and during trial. In *Caldwell*, the agent, "[i]n his dual capacity as defense assistant and Government agent . . . gained free access to the planning of the defense. . . . Neither his dealings with the defense nor his reports to the prosecution were limited to the proposed unlawful acts of the defense: they covered many matters connected with the impending trial." 92 U. S. App. D. C., at 356, 205 F. 2d, at 880.

We may assume that the *Coplon* and *Caldwell* cases were rightly decided, and further assume, without deciding, that the Government's activities during the Test Fleet trial were sufficiently similar to what went on in *Coplon* and *Caldwell* to invoke the rule of those decisions. Consequently, if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. *Black* v. *United States, ante*, p. 26.

But a holding that it follows from this presumption that the petitioner's conviction in the present case should be set aside would be both unprecedented and irrational. In *Coplon* and in *Caldwell*, the Court of Appeals held that the Government's intrusion upon the defendant's relationship with his lawyer "invalidates the trial at which it occurred." 89 U. S. App. D. C., at 114, 191 F. 2d, at 759; 92 U. S. App. D. C., at 357, 205 F. 2d, at 881. In both of those cases the court directed a new trial,[9] and the second trial in *Caldwell* resulted in a conviction which this Court declined to review. 95 U. S. App. D. C. 35, 218 F. 2d 370, 349 U. S. 930. The argument here, therefore, goes far beyond anything decided in *Caldwell* or in *Coplon*. For if the petitioner's argument were accepted,

[9] In *Coplon*, the grant of a new trial was conditioned on the defendant's proof of her wiretapping allegations.

not only could there have been no new conviction on the existing charges in *Caldwell*, but not even a conviction on other and different charges against the same defendant.

It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment.[10] But even if it were further arguable that a situation could be hypothesized in which the Government's previous activities in undermining a defendant's Sixth Amendment rights at one trial would make evidence obtained thereby inadmissible in a different trial on other charges, the case now before us does not remotely approach such a situation.

This is so because of the clinching basic fact in the present case that none of the petitioner's incriminating statements which Partin heard were made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution. The petitioner's statements related to the commission of a quite separate offense—attempted bribery of jurors—and the statements were made to Partin out of the presence of any lawyers.

Even assuming, therefore, as we have, that there might have been a Sixth Amendment violation which might have made invalid a conviction, if there had been one, in the Test Fleet case, the evidence supplied by Partin in the present case was in no sense the "fruit" of any such violation. In *Wong Sun* v. *United States*, 371 U. S. 471, a case involving exclusion of evidence under

[10] In the *Caldwell* case, the Court of Appeals implicitly recognized the possibility of a case arising in which a showing could be made of "prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused." 92 U. S. App. D. C. 355, 357, n. 11, 205 F. 2d 879, 881–882, n. 11.

the Fourth Amendment, the Court stated that "the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." 371 U. S., at 488.

Even upon the premise that this same strict standard of excludability should apply under the Sixth Amendment—a question we need not decide—it is clear that Partin's evidence in this case was not the consequence of any "exploitation" of a Sixth Amendment violation. The petitioner's incriminating statements to which Partin testified in this case were totally unrelated in both time and subject matter to any assumed intrusion by Partin into the conferences of the petitioner's counsel in the Test Fleet trial. These incriminating statements, all of them made out of the presence or hearing of any of the petitioner's counsel, embodied the very antithesis of any legitimate defense in the Test Fleet trial.

B.

The petitioner's second argument under the Sixth Amendment needs no extended discussion. That argument goes as follows: Not later than October 25, 1962, the Government had sufficient ground for taking the petitioner into custody and charging him with endeavors to tamper with the Test Fleet jury. Had the Government done so, it could not have continued to question the petitioner without observance of his Sixth Amendment right to counsel. *Massiah* v. *United States,* 377 U. S. 201; *Escobedo* v. *Illinois,* 378 U. S. 478. Therefore, the argument concludes, evidence of statements

made by the petitioner subsequent to October 25 was inadmissible, because the Government acquired that evidence only by flouting the petitioner's Sixth Amendment right to counsel.

Nothing in *Massiah*, in *Escobedo*, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested.[11] The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

IV.

Finally, the petitioner claims that even if there was no violation—"as separately measured by each such Amendment"—of the Fourth Amendment, the compulsory self-incrimination clause of the Fifth Amendment, or of the Sixth Amendment in this case, the judgment of conviction must nonetheless be reversed. The argument is based upon the Due Process Clause of the Fifth Amendment. The "totality" of the Government's conduct during the Test Fleet trial operated, it is said, to "'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples

[11] We put to one side the extraordinary problems that would have arisen if the petitioner had been arrested and charged during the progress of the Test Fleet trial.

even toward those charged with the most heinous offenses' (*Rochin* v. *California*, 342 U. S. 165, 169)."

The argument boils down to a general attack upon the use of a government informer as "a shabby thing in any case," and to the claim that in the circumstances of this particular case the risk that Partin's testimony might be perjurious was very high. Insofar as the general attack upon the use of informers is based upon historic "notions" of "English-speaking peoples," it is without historical foundation. In the words of Judge Learned Hand, "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. . . ." *United States* v. *Dennis*, 183 F. 2d 201, at 224.

This is not to say that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent. See *Massiah* v. *United States*, 377 U. S. 201. It *is* to say that the use of secret informers is not *per se* unconstitutional.

The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case, Partin was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently ex-

plored.[12] The trial judge instructed the jury, both specifically[13] and generally,[14] with regard to assessing Partin's credibility. The Constitution does not require us to upset the jury's verdict.

Affirmed.

MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

[For opinion of MR. JUSTICE DOUGLAS, see *post*, p. 340.]

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[12] Partin underwent cross-examination for an entire week. The defense was afforded wide latitude to probe Partin's background, character, and ties to the authorities; it was permitted to explore matters that are normally excludable, for example, whether Partin had been charged with a crime in 1942, even though that charge had never been prosecuted.

[13] The judge instructed the jury that it was petitioner's contention that he "did not invite Edward Partin to come to Nashville, Tennessee, during the trial of [the Test Fleet case] but that the said Edward Partin came of his own accord under the pretense of attempting to convince Mr. Hoffa that the Teamsters local union in Baton Rouge, Louisiana should not be placed in trusteeship by reason of Partin's being under indictment and other misconduct on Partin's part, but for the real purpose of fabricating evidence against Hoffa in order to serve his own purposes and interests."

[14] The jury was instructed: "You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case . . . . All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care."

MR. CHIEF JUSTICE WARREN, dissenting.

I cannot agree either with the opinion of the Court affirming these convictions or with the separate opinions of MR. JUSTICE CLARK and MR. JUSTICE DOUGLAS to the effect that the writs of certiorari were improvidently granted.

I.

As to the latter, it seems to me that the finding of the District Court which so troubles my Brothers CLARK and DOUGLAS is in fact no roadblock to our review of the important questions presented by the petitions. It has long been settled that this Court will not be bound by the findings of lower courts when it is alleged that fundamental constitutional rights have been violated. *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Watts* v. *Indiana*, 338 U. S. 49 (1949); *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945); *Norris* v. *Alabama*, 294 U. S. 587 (1935). We have said, "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." *Napue* v. *Illinois*, 360 U. S. 264, 271 (1959).

The finding in question here is not one which the District Judge arrived at by resolving contradictory testimony on the basis of credibility. Findings of fact based on crediting the testimony of some witnesses and discrediting the testimony of others may properly be accorded some insulation from appellate review because of the superior opportunity of the trial judge to observe the demeanor of the witnesses. In this case, however, the testimony concerning the circumstances surrounding Partin's entry into Hoffa's councils was not sub-

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stantially in dispute. While those circumstances are set forth in greater detail *infra*, a brief summary discloses that Partin, after discussing Hoffa with federal agents and learning of their intense and mutually beneficial interest, successfully solicited an invitation to meet with Hoffa. Partin's release from jail was assisted by the federal agents, and he was compensated in a financial sense as well; in return, he kept the federal agents fully informed of all that occurred from the outset of his contact with Hoffa.

Surely the only reasonable construction of these facts is that Partin was acting as a paid federal informer when he traveled to Nashville and attached himself to Hoffa. And the fact that Hoffa on Partin's urging agreed to a meeting in Nashville is not inconsistent with this conclusion. An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force. See *Massiah* v. *United States*, 377 U. S. 201 (1964); *Gouled* v. *United States*, 255 U. S. 298 (1921).

Moreover, at the time we granted the petitions for certiorari in these cases, we knew exactly what we know now. The findings of the District Court were in the record then before us, and no new facts to change the situation have since come to light. In short, there is nothing which should prevent us from facing up to the important questions presented and determining whether the convictions can stand either in light of the Constitution or under our power of supervision over the administration of justice in federal courts.

II.

For me, this case and two others decided today (*Lewis* v. *United States*, *ante*, p. 206, and *Osborn* v. *United States*, *post*, p. 323) present for comparison different facets of the Government's use of informers and under-

cover agents. In two cases of the set I have voted to sustain the activity of the Government. But in this case I find it impossible to do so because the nature of the official practices evidenced here is offensive to the fair administration of justice in federal courts.

At this late date in the annals of law enforcement, it seems to me that we cannot say either that every use of informers and undercover agents is proper or, on the other hand, that no uses are. There are some situations where the law could not adequately be enforced without the employment of some guile or misrepresentation of identity. A law enforcement officer performing his official duties cannot be required always to be in uniform or to wear his badge of authority on the lapel of his civilian clothing. Nor need he be required in all situations to proclaim himself an arm of the law. It blinks the realities of sophisticated, modern-day criminal activity and legitimate law enforcement practices to argue the contrary. However, one of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement.

I find these three cases which we decide today quite distinguishable from each other in this regard. Although all three involve what may be termed official deception in order to gather evidence for criminal prosecutions, the police practices reviewed are essentially different. The simplest of the three for me is *Lewis*, wherein a federal narcotics agent, having reason to believe that Lewis was a trafficker in narcotics, called him on the telephone using an assumed name and told him that a mutual friend had said Lewis sold narcotics. Lewis affirmed the nature of his occupation and invited the agent to his place of business which, as an incidental matter, turned out also

to be his home. The agent went there, purchased narcotics and arranged for future dealings to occur at the same place but on a reduced-price basis. Later, a second purchase of narcotics was executed by the agent in the same manner.

In *Lewis*, then, there was no intrusion upon the privacy of the household. Nothing was heard, seen, or taken by the agent that was not a necessary part of the business transactions between him and Lewis. The purpose of the agent's visits was to buy narcotics from Lewis, and the details of their business dealings were all that concerned him. *Lewis* simply is not a case where an undercover agent invaded a place used both as a business location and a home and then, overtly or covertly, either seized something or observed or heard something unrelated to the business purpose of his visit. As we said in affirming Lewis' conviction, the principles elaborated in *Gouled* v. *United States*, 255 U. S. 298 (1921), would protect against such overreaching. We do not endorse unconscionable activities or the use of an unreliable informer when we sustain the undercover work of the agent responsible for Lewis' conviction. Compare *Sherman* v. *United States*, 356 U. S. 369 (1958).

In the *Osborn* case, the petitioner employed Robert Vick, a police officer of Nashville, Tennessee, to investigate persons who were members of a panel from which a federal criminal jury was to be selected in a prior trial of James Hoffa in that city. Although he knew Vick's loyalty was due the police department, when he learned that Vick had a cousin on the panel he urged Vick to offer the cousin $10,000 in return for the latter's promise to vote for acquittal if selected to sit on the petit jury. Vick informed federal authorities of this proposal, and made an affidavit to that effect for the judge who was to preside at the Hoffa trial. The judge, in order to determine the truthfulness of the affidavit and to protect

the integrity of the trial, authorized the equipping of Vick with a recording device to be used in further conversations with petitioner. I see nothing wrong with the Government's thus verifying the truthfulness of the informer and protecting his credibility in this fashion.[1] *Lopez* v. *United States*, 373 U. S. 427 (1963). This decision in no sense supports a conclusion that unbridled use of electronic recording equipment is to be permitted in searching out crime. And it does not lend judicial sanction to wiretapping, electronic "bugging" or any of the other questionable spying practices that are used to invade privacy and that appear to be increasingly prevalent in our country today. Cf. *Silverman* v. *United States*, 365 U. S. 505 (1961); *Black* v. *United States*, *ante*, p. 26; *United States* v. *Schipani*, 362 F. 2d 825, cert. denied, *post*, p. 934, rehearing granted, judgment vacated, and case remanded on suggestion of Solicitor General, *post*, p. 372.

But I consider both *Lewis* and *Osborn* to be materially, even fundamentally, different from this *Hoffa* case. Here, Edward Partin, a jailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the

[1] The recording was not used here as a means to avoid calling the informer to testify. As I noted in my opinion concurring in the result in *Lopez* (373 U. S., at 441), I would not sanction the use of a secretly made recording other than for the purposes of corroborating the testimony of a witness who can give firsthand testimony concerning the recorded conversations and who is made available for cross-examination.

State and Federal Governments.[2] And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.

Shortly after Partin made contact with the federal authorities and told them of his position in the Baton

[2] One Sydney Simpson, who was Partin's cellmate at the time the latter first contacted federal agents to discuss Hoffa, has testified by affidavit as follows:

"Sometime in September, 1962, I was transferred from the Donaldsonville Parish Jail to the Baton Rouge Parish Jail. I was placed in a cell with Partin. For the first few days, Partin acted sort of brave. Then when it was clear that he was not going to get out in a hurry, he became more excited and nervous. After I had been in the same cell with Partin for about three days, Partin said, 'I know a way to get out of here. They want Hoffa more than they want me.' Partin told me that he was going to get one of the deputies to get Bill Daniels. Bill Daniels is an officer in the State of Louisiana. Partin said he wanted to talk to Daniels about Hoffa. Partin said that he was going to talk to Captain Edwards and ask him to get Daniels. A deputy, whose name is not known to me, came and took Partin from the cell. Partin remained away for several hours.

"A few days later Partin was released from the jail. From the day when I first saw the deputy, until the date when Partin was released, Partin was out of the cell most of the day and sometimes part of the night. On one occasion Partin returned to the cell and said, 'It will take a few more days and we will have things straightened out, but don't worry.' Partin was taken in and out of the cell frequently each day. Partin told me during this time that he was working with Daniels and the FBI to frame Hoffa. On one occasion I asked Partin if he knew enough about Hoffa to be of any help to Daniels and the FBI, and Partin said, 'It doesn't make any difference. If I don't know it, I can fix it up.'

"While we were in the cell, I asked Partin why he was doing this to Hoffa. Partin replied: 'What difference does it make? I'm thinking about myself. Aren't you thinking about yourself? I don't give a damn about Hoffa. . . .'" R. 171–172.

Rouge Local of the Teamsters Union and of his acquaintance with Hoffa, his bail was suddenly reduced from $50,000 to $5,000 and he was released from jail. He immediately telephoned Hoffa, who was then in New Jersey, and, by collaborating with a state law enforcement official, surreptitiously made a tape recording of the conversation. A copy of the recording was furnished to federal authorities. Again on a pretext of wanting to talk with Hoffa regarding Partin's legal difficulties, Partin telephoned Hoffa a few weeks later and succeeded in making a date to meet in Nashville where Hoffa and his attorneys were then preparing for the Test Fleet trial. Unknown to Hoffa, this call was also recorded and again federal authorities were informed as to the details.

Upon his arrival in Nashville, Partin manifested his "friendship" and made himself useful to Hoffa, thereby worming his way into Hoffa's hotel suite and becoming part and parcel of Hoffa's entourage. As the "faithful" servant and factotum of the defense camp which he became, he was in a position to overhear conversations not directed to him, many of which were between attorneys and either their client or prospective defense witnesses. Pursuant to the general instructions he received from federal authorities to report "any attempts at witness intimidation or tampering with the jury," "anything illegal," or even "anything of interest," Partin became the equivalent of a bugging device which moved with Hoffa wherever he went. Everything Partin saw or heard was reported to federal authorities and much of it was ultimately the subject matter of his testimony in this case. For his services he was well paid by the Government, both through devious and secret support payments to his wife and, it may be inferred, by executed promises not to pursue the indictments under which he was charged at the time he became an informer.

This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here. Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
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> . . . . . .
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

See also *McNabb* v. *United States*, 318 U. S. 332, 341 (1943).

I do not say that the Government may never use as a witness a person of dubious or even bad character. In performing its duty to prosecute crime the Government must take the witnesses as it finds them. They may

be persons of good, bad, or doubtful credibility, but their testimony may be the only way to establish the facts, leaving it to the jury to determine their credibility. In this case, however, we have a totally different situation. Here the Government reaches into the jailhouse to employ a man who was himself facing indictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. The Government in its zeal even assisted him in gaining a position from which he could be a witness to the confidential relationship of attorney and client engaged in the preparation of a criminal defense. And, for the dubious evidence thus obtained, the Government paid an enormous price. Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guilty of obstructing justice. I cannot agree that what happened in this case is in keeping with the standards of justice in our federal system and I must, therefore, dissent.

MR. JUSTICE CLARK, joined by MR. JUSTICE DOUGLAS.

I would dismiss the writs of certiorari as improvidently granted.

The writs of certiorari granted by the Court in these cases are limited to the following question:

> "Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge."

My examination of the record reveals that at the hearing on petitioners' motion to suppress the evidence obtained by the informer, Partin, the District Judge found that "the government did not place this witness Mr. Partin in the defendants' midst . . . rather that he was knowingly and voluntarily placed in their midst by one of the defendants [Hoffa]." This specific finding was approved by the Court of Appeals as being "supported by substantial evidence and . . . not clearly erroneous." 349 F. 2d, at 36. No attack is made here on the findings.

It has long been the rule of this Court that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). My careful examination of the record shows that there is a choice here between two permissible views as to the weight of the evidence. The District Judge found the weight of the evidence to be with the Government and the Court of Appeals has approved his finding. I cannot say on this record that it is clearly erroneous.* *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1949).

In the light of this finding, by which we are bound, there is no issue before us for decision since no evidence was "obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of" petitioner Hoffa.

I would therefore dismiss the writs as improvidently granted.

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*At one point the informer, Partin, testified: "Mr. Hoffa is the one told me he wanted me to stick around." Petitioners' own witnesses testified that Partin was in the suite "virtually every day" as well as the "nightly meetings," had "ready access" to the files and offices and acted as "sergeant-at-arms" just outside the door of the suite. Hoffa did not testify at the hearing on the motion to suppress.

OSBORN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 29. Argued October 12–13, 1966.—Decided December 12, 1966.

Petitioner, a lawyer, was indicted under 18 U. S. C. § 1503 for endeavoring to bribe a member of the jury panel in a prospective federal criminal trial. To investigate the background of potential jurors he had employed a Nashville policeman, who had, unknown to petitioner, agreed to report to federal agents any "illegal activities" he might observe. The investigator reported to federal agents that when he advised petitioner that he had a relative on the jury panel, petitioner expressed an interest in approaching him. An affidavit to this effect was presented to the District Court judges, who authorized the use of an electronic device to record further conversations between petitioner and the investigator. A tape recording of a subsequent conversation was admitted at petitioner's trial. He was convicted and the Court of Appeals affirmed the conviction. *Held:*

1. The use of a recording device here under "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" as "a precondition of lawful electronic surveillance" was permissible, and the recording itself was properly admitted in evidence. Pp. 327–331.

2. Entrapment was not established as a matter of law, for at most the investigator afforded petitioner "opportunities or facilities" for the commission of a criminal offense, a far cry from entrapment. Pp. 331–332.

3. Since this statute makes an offense of any proscribed "endeavor," a term which is not burdened with the technicalities of the word "attempt," the fact that the investigator did not approach the venireman and did not intend to approach him does not negate a violation of 18 U. S. C. § 1503. Pp. 332–333.

350 F. 2d 497, affirmed.

Jacob Kossman argued the cause and filed briefs for petitioner.

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall,*

Assistant Attorney General Vinson, Beatrice Rosenberg and *Kirby W. Patterson.*

Herman Schwartz and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, a Nashville lawyer, was convicted in the United States District Court for the Middle District of Tennessee upon one count of an indictment under 18 U. S. C. § 1503, which charged him with endeavoring to bribe a member of the jury panel in a prospective federal criminal trial.[1] The conviction was affirmed by the Court of Appeals, 350 F. 2d 497. We granted certiorari, 382 U. S. 1023, primarily to consider whether the

[1] 18 U. S. C. § 1503 provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

conviction rests upon unconstitutionally acquired evidence, although the petitioner also presses other claims.

In late 1963, James R. Hoffa was awaiting trial upon a criminal charge in the federal court in Nashville, and the petitioner, as one of Hoffa's attorneys, was engaged in preparing for that trial. In connection with these preparations the petitioner hired a man named Robert Vick to make background investigations of the people listed on the panel from which members of the jury for the Hoffa trial were to be drawn. Vick was a member of the Nashville police department whom the petitioner had employed for similar investigative work in connection with another criminal trial of the same defendant a year earlier. What the petitioner did not know was that Vick, before applying for the job with the petitioner in 1963, had met several times with federal agents and had agreed to report to them any "illegal activities" he might observe.

The conviction which we now review was upon the charge that the petitioner "during the period from on or about November 6, 1963, up to and including November 15, 1963, . . . did unlawfully, knowingly, wilfully and corruptly endeavor to influence, obstruct and impede the due administration of justice . . ." in that he "did request, counsel and direct Robert D. Vick to contact Ralph A. Elliott, who was, and was known by the said Osborn to be, a member of the petit jury panel from which the petit jury to hear the [Hoffa] trial was scheduled to be drawn, and to offer and promise to pay the said Ralph A. Elliott $10,000 to induce the said Elliott to vote for an acquittal, if the said Elliott should be selected to sit on the petit jury in the said trial." [2]

[2] The indictment contained two other counts charging similar offenses with respect to the earlier trial of the same defendant. The Government dismissed one of these counts, and the petitioner was acquitted on the other.

The primary evidence against the petitioner on this charge consisted of Vick's testimony, a tape recording of a conversation between the petitioner and Vick, and admissions which the petitioner had made during the course of federal disbarment proceedings.

Vick testified that during a discussion with the petitioner at the latter's office on November 7, he mentioned that he knew some of the prospective jurors. At this, according to Vick, the petitioner "jumped up," and said, "You do? Why didn't you tell me?" The two then moved outside into the adjacent alley to continue the conversation. There, Vick testified, he told the petitioner that one of the prospective jurors, Ralph Elliott, was his cousin, and the petitioner told Vick to pay a visit to Elliott to see what arrangements could be made about the case. Vick also testified to meetings with the petitioner on November 8 and November 11, when he told the petitioner, falsely, that he had visited Elliott and found him "susceptible to money for hanging this jury," to which the petitioner responded by offering $5,000 to Elliott if he became a member of the jury and an additional $5,000 "when he hung the jury, but he would have to go all the way, and to assure Mr. Elliott that he would not be alone, that there would be some other jurors in there."

I.

No claim is made in this case that Vick's testimony about the petitioner's incriminating statements was inadmissible in evidence. Cf. *Hoffa* v. *United States, ante,* p. 293; *Lewis* v. *United States, ante,* p. 206. What is challenged is the introduction in evidence of a tape recording of one of the conversations about which Vick testified, specifically the conversation which took place in the petitioner's office on November 11. The recording of this conversation was played for the jury, and a written transcript of it was introduced in evidence. We

are asked to hold that the recording should have been excluded, either upon constitutional grounds, *Weeks* v. *United States*, 232 U. S. 383, or in the exercise of our supervisory power over the federal courts. *McNabb* v. *United States*, 318 U. S. 332.

There is no question of the accuracy of the recording. The petitioner testified that it was a "substantially correct" reproduction of what took place in his office on November 11. There can be no doubt, either, of the recording's probative relevance. It provided strong corroboration of the truth of the charge against the petitioner.[3] The recording was made by means of a device concealed upon Vick's person during the November 11 meeting. We thus deal here not with surreptitious surveillance of a private conversation by an outsider, cf. *Silverman* v. *United States*, 365 U. S. 505, but, as in *Lopez* v. *United States*, 373 U. S. 427, with the use by one party of a device to make an accurate record of a conversation about which that party later testified. Unless *Lopez* v. *United States* is to be disregarded, therefore, the petitioner cannot prevail.[4]

But we need not rest our decision here upon the broad foundation of the Court's opinion in *Lopez*, because it is evident that the circumstances under which the tape recording was obtained in this case fall within the narrower compass of the *Lopez* concurring and dissenting opinions. Accordingly, it is appropriate to set out with some precision what these circumstances were.

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[3] A transcript of the recording is reproduced as an Appendix to this opinion.

[4] It is argued that in *Lopez* the petitioner knew that the person to whom he offered a bribe was a federal officer. But, even assuming there might otherwise be some force to this distinction, it is enough to point out that in the present case the petitioner also knew he was talking to a law enforcement officer—a member of the Nashville police department.

Immediately after his November 7 meeting with the petitioner, at which, according to Vick, the possibility of approaching the juror Elliott was first discussed, Vick reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did.[5] The following day this sworn statement was shown by government attorneys to the two judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering this affidavit, the judges agreed to authorize agents of the Federal Bureau of Investigation to conceal a recorder on Vick's person in order to determine from recordings of further

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[5] The relevant portion of this affidavit was as follows:

"On November 7, 1963, I was in Mr. Osborn's office going over the results of my investigation. I was aware that the jury panel which I had been investigating was the panel assigned to Judge William E. Miller. Mr. Osborn and I got into a discussion of the jury panel assigned to Judge Frank Gray, Jr. This jury panel list had previously been shown to me by John Polk, an investigator for Mr. Osborn. Polk told me at that time that he was investigating the jury panel assigned to Judge Gray. At that time, I mentioned to Polk that I knew three of the people on the jury panel. In discussing the panel with Mr. Osborn, I again mentioned that I knew three of the people on the jury panel. Mr. Osborn said, 'You do? Why didn't you tell me?' I told Mr. Osborn I had told John Polk and assumed that John Polk had told him. Mr. Osborn said that Polk had not told him and suggested that we discuss the matter further. We then left Mr. Osborn's office and walked out onto the street to discuss the matter further. Mr. Osborn asked me how well I knew the three prospective jurors. I told him that I knew Mr. Ralph A. Elliott, Springfield, Tennessee, the best since he was my cousin. Mr. Osborn asked me whether I knew him well enough to talk to him about anything. I said that I thought I did. Mr. Osborn then said, 'Go contact him right away. Sit down and talk to him and get him on our side. We want him on the jury.' I told Mr. Osborn that I thought Mr. Elliott was not in very good financial position and Mr. Osborn said, 'Good, go see him right away.'"

conversations between Vick and the petitioner whether the statements in Vick's affidavit were true. It was this judicial authorization which ultimately led to the recording here in question.[6]

The issue here, therefore, is not the permissibility of "indiscriminate use of such devices in law enforcement," [7] but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the "requirement of particularity" which the dissenting opinion in *Lopez* found necessary.[8]

The situation which faced the two judges of the District Court when they were presented with Vick's affidavit on November 8, and the motivations which prompted their authorization of the recorder are re-

[6] The recording device did not operate properly on the occasion of Vick's visit to the petitioner's office on November 8, and Vick made a written statement of what occurred during that meeting. The government lawyers reported these circumstances to District Judge Miller, who then authorized the use of the recorder on November 11, under the same conditions:

"I said on that second occasion the same as I did on the first occasion: that the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was."

[7] "I also share the opinion of MR. JUSTICE BRENNAN that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods." *Lopez* v. *United States*, 373 U. S., at 441 (concurring opinion of THE CHIEF JUSTICE).

[8] 373 U. S., at 463.

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flected in the words of Chief Judge Miller. As he put it, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I have been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug."

So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of " 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' " as "a precondition of lawful electronic surveillance." [9]

[9] "The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,' *Ohio ex rel. Eaton* v. *Price*, 364 U. S. 263, 272 (separate opinion); see *McDonald* v. *United States*, 335 U. S. 451, 455; *Abel* v. *United States*, 362 U. S. 217, 251–252 (dissenting opinion), could be made a precondition of lawful electronic surveillance. . . ." *Lopez* v. *United States*, 373 U. S., at 464 (dissenting opinion of MR. JUSTICE BRENNAN).

We hold on these facts that the use of the recording device was permissible, and consequently that the recording itself was properly admitted as evidence at the petitioner's trial.

II.

The petitioner's defense was one of entrapment, and he renews here the contention made in his motion for acquittal at the trial that entrapment was established as a matter of law. We cannot agree.

The validity of the entrapment defense depended upon what had transpired at the meetings between the petitioner and Vick which took place before the recorded conversation of November 11. According to the petitioner, Vick initiated the idea of making a corrupt approach to Elliott on October 28, and the petitioner at first resisted the suggestion and tried to discourage Vick from carrying it out. The petitioner conceded that he ultimately acquiesced in the scheme, out of "weakness" and because he was exhausted from overwork, but said that he never seriously intended actually to carry out the plan to bribe Elliott. But Vick's version of what had happened was, as stated above, quite different, and the truth of the matter was for the jury to determine.[10] *Masciale* v. *United States,* 356 U. S. 386. Surely it was not a "trap for the unwary innocent," *Sherman* v. *United States,* 356 U. S. 369, 372, for Vick to tell the petitioner, truthfully, that he knew some of the members of the jury panel and that one of them was his cousin. And according to Vick he had said no more when the petitioner "jumped up," went out into the alley with him, and initiated the effort to get Elliott "on our side." At the most, Vick's statement afforded the petitioner "opportunities or facilities" for the commission of a criminal

[10] The petitioner's trial counsel explicitly conceded that the entrapment issue was for the jury to resolve.

offense, and that is a far cry from entrapment. *Sherman* v. *United States, supra,* at 372; *Sorrells* v. *United States,* 287 U. S. 435, 441.[11]

III.

Finally, the argument is made that even if the admissibility and truth of all the evidence against the petitioner be accepted, this conviction must be set aside because his conduct did not constitute a violation of 18 U. S. C. § 1503.[12] The basis for this argument is that since Vick never in fact approached Elliott and never intended to do so, any endeavor on the petitioner's part was impossible of accomplishment.

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[11] The petitioner further argues, with respect to the entrapment defense, that the jury instructions were erroneous in two respects, and that government rebuttal evidence was improperly received.

It is urged that the trial judge committed error in failing to instruct the jury that if they acquitted the petitioner under Count 2 (charging an endeavor to bribe a juror at the 1962 Hoffa trial), they must not consider any evidence under that count in determining the petitioner's guilt under Count 1. Such an instruction was not requested. Rule 30, Fed. Rules Crim. Proc. Moreover, it is settled that when the defense of entrapment is raised, evidence of prior conduct tending to show the defendant's predisposition to commit the offense charged is admissible. See *Sorrells* v. *United States,* 287 U. S. 435, 451.

The petitioner further argues that the instructions on entrapment erroneously left to the jury the question of whether the tape recording had been obtained by lawful means. We do not so understand the trial judge's language, and neither, apparently, did trial counsel, because no objection was made to the instructions as given. Rule 30, Fed. Rules Crim. Proc. Moreover, such an instruction would have been favorable to the petitioner, because the judge, in denying the earlier defense motion to suppress, had already ruled that the recording had been lawfully obtained.

Finally, objection is made to permitting the Government on rebuttal to introduce Vick's November 8 affidavit and show the circumstances under which the tape recording had been authorized by the judges. But this evidence was a relevant response to the petitioner's testimony that it was Vick who, at the instigation of the Government, had initiated the plan to approach Elliott as early as October 28.

[12] See n. 1, *supra.*

We reject the argument. Whatever continuing validity the doctrine of "impossibility," with all its subtleties, may continue to have in the law of criminal attempt,[13] that body of law is inapplicable here. The statute under which the petitioner was convicted makes an offense of any proscribed "endeavor." And almost 50 years ago this Court pointed out the significance of that word: "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . . The section . . . is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." *United States* v. *Russell,* 255 U. S. 138, 143.

If the evidence against the petitioner be accepted, there can be no question that he corruptly endeavored to impede the due administration of justice by instructing Robert Vick to offer a bribe to a prospective juror in a federal criminal case.

Affirmed.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT.

Transcript of the recording of the Vick-Osborn conversation of November 11, 1963:

"Girl: You can go in now.

"Vick: O. K. honey. Hello, Mr. Osborn.

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[13] Compare *People* v. *Jaffe,* 185 N. Y. 497, 78 N. E. 169, with *People* v. *Gardner,* 144 N. Y. 119, 38 N. E. 1003. See Wechsler, Jones & Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Col. L. Rev. 571, 578–585 (1961).

"Osborn: Hello Bob, close the door, my friend, and let's see what's up.

"Vick: How're you doing?

"Osborn: No good. How're you doing?

"Vick: Oh, pretty good. You want to talk in here?

"Osborn: How far did you go?

"Vick: Well, pretty far.

"Osborn: Maybe we'd better . . .

"Vick: Whatever you say. Don't make any difference to me.

"Osborn: [Inaudible whisper.]

"Vick: I'm comfortable, but er, this chair sits good, but we'll take off if you want to, but

"Osborn: Did you talk to him?

"Vick: Huh?

"Osborn: Did you talk to him?

"Vick: Yeah. I went down to Springfield Saturday morning and talked to er.

"Osborn: Elliott?

"Vick: Elliott.

"Osborn: [Inaudible whisper.]

"Vick: Huh?

"Osborn: Is there any chance in the world that he would report you?

"Vick: That he will report me to the FBI? Why of course, there's always a chance, but I wouldn't got into it if I thought it was very, very great.

"Osborn: [Laughed.]

"Vick: You understand that.

"Osborn: [Laughing.] Yeah, I do know. Old Bob first.

"Vick: That's right. Don't worry. I'm gonna take care of old Bob and I know, and of course I'm depending on you to take care of old Bob if anything, if anything goes wrong.

"Osborn: I am. I am. Why certainly.

"Vick: Er, we had coffee Saturday morning and now he had previously told you that it's the son.

"Osborn: It is?

"Vick: Yes, and not the father.

"Osborn: That's right.

"Vick: The son is Ralph Alden Elliott and the father is Ralph Donnal. Alden is er—Marie, that's Ralph's wife who killed herself. That was her maiden name, Alden, see? Anyway, we had coffee and he's been on a hung jury up here this week, see?

"Osborn: I know that.

"Vick: Well, I didn't know that but anyway, he brought that up so he got to talking about the last Hoffa case being hung, you know, and some guy refused $10,000 to hang it, see, and he said the guy was crazy, he should've took it, you know, and so we talked about and so just discreetly, you know, and course I'm really playing this thing slow, that's the reason I asked you if you wanted a lawyer down there to handle it or you wanted me to handle it, cause I'm gonna play it easy.

"Osborn: The less people, the better.

"Vick: That's right. Well, I'm gonna play it slow and easy myself and er, anyway, we talked about er, something about five thousand now and five thousand later, see, so he did, he brought up five thousand see, and talking about about [*sic*] how they pay it off you know and things like that. I don't know whether he suspected why I was there or not cause I don't just drop out of the blue to visit him socially, you know. We're friends, close kin, cousins, but I don't ordinarily just, we don't fraternize, you know, and er, so he seemed very receptive for er, to hang the thing for five now and five later. Now, er, I thought I would report back to you and see what you say.

"Osborn: That's fine! The thing to do is set it up for a point later so you won't be running back and forth.

"Vick: Yeah.

"Osborn: Then tell him it's a deal.

"Vick: It's what?

"Osborn: That it's a deal. What we'll have to do—when it gets down to the trial date, when we know the date, tomorrow for example if the Supreme Court rules against us, well within a week we'll know when the trial comes. Then he has to be certain that when he gets on, he's got to know that he'll just be talking to you and nobody else. ——

"Vick: Social strictly.

"Osborn: Oh yeah.

"Vick: I've got my story all fixed on that.

"Osborn: Then he will have to know where to, he will have to know where to come.

"Vick: Well, er . . .

"Osborn: And, he'll have to know when.

"Vick: Er, do you want to see him yourself? You want me to handle it or what?

"Osborn: Uh huh. You're gonna handle it yourself.

"Vick: All right. You want to know it when he's ready, when I think he's ready for the five thousand. Is that right?

"Osborn: Well no, when he gets on the panel, once he gets on the jury. Provided he gets on the panel.

"Vick: Yeah. Oh yeah. That's right. That's right. Well now, he's on the number one.

"Osborn: I know, but now . . .

"Vick: But you don't know that would be the one.

"Osborn: Well, I know this, that if we go to trial before that jury he'll be on it but suppose the government challenges him over being on another hung jury.

"Vick: Oh, I see.

"Osborn: Where are we then?

"Vick: Oh, I see. I see.

"Osborn: So we have to be certain that he makes it on the jury.

"Vick: Well now, here's one thing, Tommy. He's a member of the CWA, see, and the Teamsters, or

"Osborn: Well, they'll knock him off.

"Vick: Naw, they won't. They've had a fight with the CWA, see?

"Osborn: I think everything looks perfect.

"Vick: I think it's in our favor, see. I think that'll work to our favor.

"Osborn: That's why I'm so anxious that they accept him.

"Vick: I think they would, too. I don't think they would have a reason in the world to. I don't think that I'm under any surveillance or suspicion or anything like that.

"Osborn: I don't think so.

"Vick: I don't know. I don't frankly think, since last year and since I told them I was through with the thing, I don't think I have been. Now Fred,

"Osborn: I don't think you have either.

"Vick: You know Fred and I may not [pause], he may be too suspicious and I may not be suspicious enough. I don't know.

"Osborn: I think you've got it sized up exactly right.

"Vick: Well, I think so.

"Osborn: Now, you know you promised that fella that you would have nothing more to do with that case.

"Vick: That's right.

"Osborn: At that time you had already checked on some of the jury that went into Miller's court. You went ahead and did that.

"Vick: Well, here's another thing, Tommy.

"Osborn: — church affiliations, background, occupation and that sort of thing on those that went into Miller's court. You didn't even touch them. You didn't even investigate the people that were in Judge Gray's court.

"Vick: Well, here's the thing about it, Tommy. Soon as this damn thing's over, they're gonna kick my . . .

out anyway, so probably Fred's too. So, I might as well get out of it what I can. The way I look at it. I might be wrong cause the Tennessean is not gonna have anything to do with anybody that's had anything to do with the case now or in the past, you know that. Cause they're too close to the Kennedy's.

"Osborn: All right, so we'll leave it to you. The only thing to do would be to tell him, in other words your next contact with him would be to tell him if he wants that deal, he's got it.

"Vick: O. K.

"Osborn: The only thing it depends upon is him being accepted on the jury. If the government challenges him there will be no deal.

"Vick: All right. If he is seated.

"Osborn: If he's seated.

"Vick: He can expect five thousand then and

"Osborn: Immediately.

"Vick: Immediately and then five thousand when it's hung. Is that right?

"Osborn: All the way, now!

"Vick: Oh, he's got to stay all the way?

"Osborn: All the way.

"Vick: No swing. You don't want him to swing like we discussed once before. You want him

"Osborn: Of course, he could be guided by his own b——, but that always leaves a question. The thing to do is just stick with his crowd. That way we'll look better and maybe they'll have to go to another trial if we get a pretty good count.

"Vick: Oh. Now, I'm going to play it just like you told me previously, to reassure him and keep him from getting panicky, you know. I have reason to believe that he won't be alone, you know.

"Osborn: You assure him of that. 100%.

"Vick: And to keep any fears down that he might have, see?

"Osborn: Tell him there will be at least two others with him.

"Vick: Now, another thing, I want to ask you does John know anything. You know, I originally told John about me knowing.

"Osborn: He does not know one thing.

"Vick: He doesn't know. O. K.

"Osborn: He'll come in and recommend this man —— and I'll say well just let it alone, you know.

"Vick: Yeah. So he doesn't know anything about this at all?

"Osborn: Nothing.

"Vick: Now he hasn't seen me. When I first came here he was in here, see.

"Osborn: —— We'll keep it secret. The way we keep it safe is that nobody knows about it but you and me —— where could they ever go?

"Vick: Well that's it, I reckon, or I'll probably go down there. See, I'm off tonight. I'm off Sunday and Monday, see. That's why I talked to you yesterday. I had a notion to go down there yesterday cause I was off last night and I'm off again tonight.

"Osborn: It will be a week at least until we know the trial date.

"Vick: O. K. You want to hold up doing anything further till we know.

"Osborn: Unless he should happen to give you a call and —— something like that, then you just tell him, whenever you happen to run into him.

"Vick: Well, he's not apt to call, cause see

"Osborn: You were very circumspect.

"Vick: Yeah. We haven't talked really definite and I think he clearly understands. Now, he might, it seemed to me that maybe he thought I was joking or, you know.

"Osborn: That's a good way to leave it, he's the one that brought it up.

"Vick: That's right.

"Osborn: ——

"Vick: Well, I knew he would before I went down there.

"Osborn: Well, ——

"Vick: Huh?

"Osborn: I'll be talking to you.

"Vick: I'll wait a day or two.

"Osborn: Yeah. I would.

"Vick: Before I contact him. Don't want to seem anxious and er

"Osborn: ——

"Vick: O. K. See you later."

MR. JUSTICE DOUGLAS, dissenting in *Osborn* v. *United States* and *Lewis* v. *United States, ante,* p. 206; and concurring with MR. JUSTICE CLARK in *Hoffa* v. *United States, ante,* p. 293.

These cases present important questions of federal law concerning the privacy of our citizens and the breach of that privacy by government agents. *Lewis* v. *United States* involves the breach of the privacy of the home by a government agent posing in a different role for the purpose of obtaining evidence from the homeowner to convict him of a crime. *Hoffa* v. *United States* raises the question whether the Government in that case induced a friend of Hoffa's to insinuate himself into Hoffa's entourage, there to serve as the Government's eyes and ears for the purpose of obtaining incriminating evidence. *Osborn* v. *United States* presents the question whether the Government may compound the invasion of privacy by using hidden recording devices to record incriminating statements made by the unwary suspect to a secret federal agent.

Thus these federal cases present various aspects of the constitutional right of privacy. Privacy, though not expressly mentioned in the Constitution, is essential to the exercise of other rights guaranteed by it. As we recently said in *Griswold* v. *Connecticut*, 381 U. S. 479, 484:

> "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' "

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control.

Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms, are common.[1] Offices, conference rooms,

[1] See generally Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Invasions of Privacy, 89th Cong., 1st Sess. (1965).

hotel rooms, and even bedrooms (see *Irvine* v. *California*, 347 U. S. 128) are "bugged" for the convenience of government. Peepholes in men's rooms are there to catch homosexuals. See *Smayda* v. *United States*, 352 F. 2d 251. Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like.[2] Federal agents are often "wired" so that their conversations are either recorded on their persons (*Lopez* v. *United States*, 373 U. S. 427) or transmitted to tape recorders some blocks away.[3] The Food and Drug Administration recently put a spy in a church organization.[4] Revenue agents have gone in the disguise of Coast Guard officers.[5] They have broken and entered homes to obtain evidence.[6]

Polygraph tests of government employees and of employees in industry are rampant.[7] The dossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified.[8]

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[2] See generally Hearings before a Subcommittee of the House Committee on Government Operations, Special Inquiry on Invasion of Privacy, 89th Cong., 1st Sess. (1965); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Psychological Tests and Constitutional Rights, 89th Cong., 1st Sess. (1965).

[3] See, *e. g.*, Hearings before the Subcommittee on Administrative Practice and Procedure, *supra*, n. 1, pt. 2, at 389.

[4] *Id.*, at 783.

[5] *Id.*, pt. 3, at 1356.

[6] *Id.*, at 1379, 1415.

[7] See generally Hearings before a Subcommittee of the House Committee on Government Operations, Use of Polygraphs As "Lie Detectors" By the Federal Government, 88th Cong., 2d Sess. (1964).

[8] See generally Hearings before a Subcommittee of the House Committee on Government Operations, The Computer and Invasion of Privacy, 89th Cong., 2d Sess., July 26, 27, and 28, 1966.

These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will.

We have here in the District of Columbia squads of officers who work the men's rooms in public buildings trying to get homosexuals to solicit them. See *Beard* v. *Stahr*, 200 F. Supp. 766, 768, judgment vacated, 370 U. S. 41. Undercover agents or "special employees" of narcotics divisions of city, state, and federal police actively solicit sales of narcotics. See generally 31 U. Chi. L. Rev. 137, 74 Yale L. J. 942. Police are instructed to pander to the weaknesses and craven motives of friends and acquaintances of suspects, in order to induce them to inform. See generally Harney & Cross, The Informer in Law Enforcement 33–44 (1960). In many cases the crime has not yet been committed. The undercover agent may enter a suspect's home and make a search upon mere suspicion that a crime will be committed. He is indeed often the instigator of, and active participant in, the crime—an *agent provocateur*. Of course, when the solicitation by the concealed government agent goes so far as to amount to entrapment, the prosecution fails. *Sorrells* v. *United States*, 287 U. S. 435; *Sherman* v. *United States*, 356 U. S. 369. But the "dirty business" (*Olmstead* v. *United States*, 277 U. S. 438, 470 (Mr. Justice Holmes dissenting)) does not begin or end with entrapment. Entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it repre-

sents lawless invasion of privacy. It is indicative of a philosophy that the ends justify the means.[9]

We are here concerned with the manner in which government agents enter private homes. In *Lewis* the undercover agent appeared as a prospective customer. Tomorrow he may be a policeman disguised as the grocery deliveryman or telephone repairman, or even a health inspector.[10] Cf. *Frank* v. *Maryland*, 359 U. S. 360; *Eaton* v. *Price*, 364 U. S. 263.

We said in *Gouled* v. *United States*, 255 U. S. 298, 306:

> "[W]hether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through

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[9] We know from the Hearings before Senate and House Committees that the Government is using such tactics on a gargantuan scale and has become callous of the rights of the citizens.

The attitude that those investigated for crime have fewer constitutional rights than others has currency:

"Senator LONG. I am curious as to whether you have a different set of principles, different standards, a different view as to the constitutional rights and privileges where the OCD is involved and where the ordinary taxpayer is involved?

"Mr. WILSON. It is pretty much a matter of fight fire with fire. Yes, I think to a degree there is a different feeling when you are working on organized crime.

"Senator LONG. In other words, you say one has constitutional rights and the other one does not?

"Mr. WILSON. No, we don't say that.

"Senator LONG. You act like it, though, don't you?

"Mr. WILSON. I am afraid you are right."

Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Invasions of Privacy, *supra*, n. 1, pt. 3, at 1477 (1965).

[10] We are told that raids by welfare inspectors to see if recipients of welfare have violated eligibility requirements flout the Fourth Amendment. See Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347 (1963).

> social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment . . . ."

Entering another's home in disguise to obtain evidence is a "search" that should bring into play all the protective features of the Fourth Amendment. When the agent in *Lewis* had reason for believing that petitioner possessed narcotics, a search warrant should have been obtained.[11]

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[11] In *Lewis*, a federal narcotics agent, posing as an operator of a bar and grill, went to petitioner's home for the purpose of obtaining narcotics from him. He had no search warrant, though there were grounds for obtaining one. Agent Cass testified that he had been assigned to investigate narcotics activities in the Boston area in June 1963. He became acquainted with one Gold, a friend of petitioner,* from whom he learned that one might obtain marihuana from the petitioner. It was then that Agent Cass, representing himself as "Jimmy the Pollack," telephoned the petitioner stating "a friend of ours told me you have some pretty good grass [marihuana]." Petitioner replied, "Yes, he told me about you, Pollack . . . I believe, Jimmy, I can take care of you." When Cass told him that he needed five bags, petitioner gave him his address and directions, and told him to come right over. On the basis of our prior decisions this information would certainly have made a sufficient showing of probable cause to justify the issuance of a warrant. Yet none was sought or obtained.

> *"[W]hen we approached the narcotic trafficker to purchase drugs for evidence, our credentials need to be good—almost impeccable. Usually considered as good credentials is an introduction by an accepted criminal who vouches for our agent. In this category the informer can supply the entree which otherwise might never be attained. Working under cover, we have sometimes been embarrassed by the informer's fulsome description of our rogue qualifications." Harney & Cross, The Informer in Law Enforcement 18–19 (1960). See Pritt, Spies and Informers in the Witness-Box (1958).

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Almost every home is at times used for purposes other than eating, sleeping, and social activities. Are the sanctity of the home and its privacy stripped away whenever it is used for business? If so, what about the "mom and pop" grocery store with living quarters in the rear? What about garment workers who do piecework at home? What about saddle makers and shoemakers who have their shops in their homes? Are those proprietors stripped of privacy because customers come into the living quarters on business matters? What about the insurance agent who works out of his home? Is the privacy of his home shattered because he sells insurance there? And the candidate who holds political conferences in his home? Or the householder who consults with his attorney or accountant in his home? Are their homes transformed into public places which the Government may enter at will merely because they are occasionally used for business? I think not. A home is still a sanctuary, however the owner may use it. There is no reason why an owner's Fourth Amendment rights cannot include the right to open up his house to limited classes of people. And, when a homeowner invites a friend or business acquaintance into his home, he opens his house to a friend or acquaintance, not a government spy.

This does not mean he can make his sanctuary invasion-proof against government agents. The Constitution has provided a way whereby the home can lawfully be invaded, and that is with a search warrant. Where, as here, there is enough evidence to get a warrant to make a search I would not allow the Fourth Amendment to be short-circuited.

We downgrade the Fourth Amendment when we forgive noncompliance with its mandate and allow these easier methods of the police to thrive.

A householder who admits a government agent, knowing that he is such, waives of course any right of privacy. One who invites or admits an old "friend" takes, I think, the risk that the "friend" will tattle and disclose confidences or that the Government will wheedle them out of him. The case for me, however, is different when government plays an ignoble role of "planting" an agent in one's living room or uses fraud and deception in getting him there. These practices are at war with the constitutional standards of privacy which are parts of our choicest tradition.

The formula approved today by the Court in *Hoffa* v. *United States, ante,* p. 293, makes it possible for the Government to use willy-nilly, son against father, nephew against uncle, friend against friend to undermine the sanctity of the most private and confidential of all conversations. The Court takes the position that whether or not the Government "placed" Partin in Hoffa's councils is immaterial. The question of whether the Government planted Partin or whether Hoffa was merely the victim of misplaced confidence is dismissed as a "verbal controversy . . . unnecessary to a decision of the constitutional issues." *Hoffa* v. *United States, ante,* at 295. But, very real differences underlie the "verbal controversy." As I have said, a person may take the risk that a friend will turn on him and report to the police. But that is far different from the Government's "planting" a friend in a person's entourage so that he can secure incriminating evidence. In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the Government has actively encouraged and participated in a breach of privacy by sending in an undercover agent. If *Gouled* is to be followed, then the Government unlawfully enters a man's home when its agent crawls through a window, breaks down a door, enters surreptitiously, or,

as alleged here, gets in by trickery and fraud. I therefore do not join in the *Hoffa* opinion.

I agree with MR. JUSTICE CLARK that the petition in that case should be dismissed as improvidently granted. The two lower courts found that Partin was not planted by the Federal Government in Hoffa's entourage. And I cannot say that those findings are clearly erroneous.

The trial court found: "I would further find that the government did not place this witness Mr. Partin in the defendants' midst or have anything to do with placing him in their midst, rather that he was knowingly and voluntarily placed in their midst by one of the defendants." The Court of Appeals held that this finding was supported by substantial evidence and not clearly erroneous. 349 F. 2d 20, 36. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. At times there are questions of law that may undercut two concurrent findings of fact.[12] See *Graver Mfg. Co.* v. *Linde Co.*, *supra*, at 280 (concurrence); *Gonzales* v. *United States*, 364 U. S. 59, 66 (dissent); *Blau* v. *Lehman*, 368 U. S. 403, 408–409. But I see no such difficulty here.

It is true that in cases from state courts involving federal constitutional rights we are careful to review findings of fact lest a state rule undercut the federal claim. *Norris* v. *Alabama*, 294 U. S. 587, 590; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Watts* v. *Indiana*, 338

[12] Compare the cases from state courts dealing with the question whether a confession has been coerced contrary to the requirements of the Fourteenth Amendment, where the Court weighs only the undisputed facts. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 153, 154; *Malinski* v. *New York*, 324 U. S. 401, 404; *Thomas* v. *Arizona*, 356 U. S. 390, 402–403; *Rogers* v. *Richmond*, 365 U. S. 534, 546.

U. S. 49, 51; *Napue* v. *Illinois,* 360 U. S. 264, 271; *Haynes* v. *Washington,* 373 U. S. 503, 515–516; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187–188. In those cases a question of fact and a question of law are usually intertwined, *e. g.,* is a confession "voluntary," is a book "obscene" and the like. Here the question for the factfinders was whether Partin was "planted" on petitioner or whether petitioner was the victim of misplaced confidence. This is not a case where "a conclusion" is "drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights." *Watts* v. *Indiana, supra,* at 51. I would apply the same legal criteria as THE CHIEF JUSTICE, once the facts are found. If we were the original factfinders the question would not be an open-and-shut one for me. But the concurrent findings by the lower courts have support in the evidence and I would let them stand.

Once electronic surveillance, approved in *Lopez* v. *United States,* 373 U. S. 427, is added to the techniques of snooping which this sophisticated age has developed, we face the stark reality that the walls of privacy have broken down and all the tools of the police state are handed over to our bureaucracy on a constitutional platter. The Court today pays lip service to this danger in *Osborn* v. *United States,* but goes on to approve what was done in the case for another reason. In *Osborn,* use of the electronic device to record the fateful conversation was approved by the two judges of the District Court in advance of its use.[13] But what the Court overlooks is

[13] The recent regulation of the Federal Communications Commission that bans the use of monitoring devices "unless such use is authorized by all of the parties engaging in the conversation" (31 Fed. Reg. 3400) is of course applicable only when air waves are used; and it does not apply to "operations of any law enforcement officers conducted under lawful authority." *Ibid.* If *Silverman* v. *United*

that the Fourth Amendment does not authorize warrants to issue for *any* search even on a showing of probable cause. The first clause of the Fourth Amendment reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

As held in *Boyd* v. *United States*, 116 U. S. 616, a validly executed warrant does not necessarily make legal the ensuing search and seizure.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never

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States, 365 U. S. 505, is read in the context of our prior decisions, then the majority view is that the use of an electronic device to record a conversation in the home is not a "search" within the meaning of the Fourth Amendment, unless the device itself penetrates the wall of the home. Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U. S. C. § 605, that governs the interception of communications made "by wire or radio" reaches only the problem of the persons to whom the message may be disclosed by federal agents as well as others (*Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338), not the practice itself.

Though § 605 protects communications "by wire or radio," the Court in *On Lee* v. *United States*, 343 U. S. 747, 754, held that § 605 was not violated when a narcotics agent wearing an electronic device entered the combination home and office of a suspect and engaged him in conversation which was broadcast to another agent stationed outside. "Petitioner [the suspect] had no wires and no wireless. There was no interference with any communications facility which he possessed or was entitled to use. He was not sending messages to anybody or using a system of communications within the Act."

If that decision stands, then § 605 extends no protection to messages intercepted by the use of electronic devices banned by the new 1966 Federal Communications Commission rule.

> been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. [*Entick* v. *Carrington,* 19 How. St. Tr. 1029.] Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." *Id.,* at 630.

It was accordingly held in *Gouled* v. *United States, supra,* at 309, that a search warrant "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding" but only to obtain contraband articles or the tools with which a crime had been committed. That decision was by a unanimous Court in 1921, the opinion being written by Mr. Justice Clarke. That view has been followed (*United States* v. *Lefkowitz,* 285 U. S. 452, 465; *Harris* v. *United States,* 331 U. S. 145, 154; *United States* v. *Rabinowitz,* 339 U. S. 56, 64) with the result that today a "search" that respects all the procedural proprieties of the Fourth Amendment is nonetheless unconstitutional if it is a "search" for testimonial evidence.

As already indicated, *Boyd* v. *United States, supra,* made clear that if the barriers erected by the Fourth Amendment were not strictly honored, serious invasions of the Fifth Amendment might result. Encouraging a person to talk into a concealed "bug" may not be compulsion within the meaning of the Fifth Amendment. But allowing the transcript to be used as evidence against the accused is using the force and power of the law to

make a man talk against his will, just as is the use of a warrant to obtain a letter from the accused's home and allowing it as evidence. "[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 116 U. S., at 635. The fact that the officer could have testified to his talk with Osborn is no answer. Then an issue of credibility between two witnesses would be raised. But the tape recording carrying the two voices is testimony introduced by compulsion and, subject to the defense that the tape was "rigged," [14] is well nigh conclusive proof.

I would adhere to *Gouled* and bar the use of all testimonial evidence obtained by wiretapping or by an electronic device. The dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy. A free society is based on the premise that there are large zones of privacy into which the Government may not intrude except in unusual circumstances. As we noted in *Griswold* v. *Connecticut, supra,* various provisions of the Bill of Rights contain this aura of privacy, including the First, Third, Fourth, Fifth, and the Ninth Amendments.[15] As respects the

[14] Rigging is easy for the expert. See Dash, The Eavesdroppers 367–371 (1959): ". . . the tape to be edited is played on a machine which can be instantaneously stopped at will. When a word or passage occurs which is to be deleted, the machine is stopped, the piece of tape containing the unwanted section is cut out, and the two loose ends are spliced. The words cut out can be inserted in whole or in part somewhere else. Sentences can be rearranged. New words can be dubbed in by an impersonator or made up of sounds taken from other words." *Id.,* 369.

". . . a skilfully edited tape cannot be detected with equipment readily available." *Id.,* 371.

[15] "The ninth amendment should be permitted to occupy its rightful place in the Constitution as a reminder at the end of the Bill of Rights that there exist rights other than those set out in the

Fourth, this premise is expressed in the provision that the Government can intrude upon a citizen's privacy only pursuant to a search warrant, based upon probable cause, and specifically describing the objects sought. And, the "objects" of the search must be either instrumentalities or proceeds of the crime. But wiretapping and electronic "bugging" invariably involve a search for mere evidence. The objects to be "seized" cannot be particularly described; all the suspect's conversations are intercepted. The search is not confined to a particular time, but may go on for weeks or months. The citizen is completely unaware of the invasion of his privacy. The invasion of privacy is not limited to him, but extends to his friends and acquaintances—to anyone who happens to talk on the telephone with the suspect or who happens to come within the range of the electronic device. Their words are also intercepted; their privacy is also shattered. Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit.

Such practices can only have a damaging effect on our society. Once sanctioned, there is every indication that their use will indiscriminately spread. The time may come when no one can be sure whether his words are being recorded for use at some future time; when every-

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first eight amendments. It was intended to preserve the underlying theory of the Constitutional Convention that individual rights exist independently of government, and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The ninth is simply a rule of construction, applicable to the entire constitution." Comment, The Uncertain Renaissance of the Ninth Amendment, 33 U. Chi. L. Rev. 814, 835 (1966).

one will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished.

I would reverse *Lewis* and *Osborn* and dismiss *Hoffa*.

Syllabus.

DEPARTMENT OF EMPLOYMENT ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 78. Argued November 15, 1966.—Decided December 12, 1966.

Appellee American National Red Cross, claiming immunity as a "federal instrumentality" from the Colorado unemployment compensation tax, together with the United States, brought this suit in a three-judge federal District Court to enjoin enforcement as to it of the tax statute and for a refund. From that court's ruling in favor of appellees, this direct appeal was taken. *Held:*

1. The three-judge court had jurisdiction to enjoin a state tax upon an organization claiming immunity as a federal instrumentality. *Query* v. *United States*, 316 U. S. 486, followed. P. 357.

2. The Tax Injunction Act (28 U. S. C. § 1341), prohibiting district courts from enjoining the collection of state taxes where a "plain, speedy and efficient" state-court remedy is available, does not restrict a suit by the United States to enjoin the unconstitutional imposition of state taxes; nor does the Eleventh Amendment bar the action. Pp. 357–358.

3. The Red Cross is clearly an instrumentality of the United States for purposes of immunity from state taxation on its operations and Congress has not waived its immunity. Pp. 358–361.

Affirmed.

James D. McKevitt, Assistant Attorney General of Colorado, argued the cause for appellants. With him on the brief were *Duke W. Dunbar,* Attorney General, and *Frank E. Hickey,* Deputy Attorney General.

Jack S. Levin argued the cause for the United States et al. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Rogovin, Harold C. Wilkenfeld* and *William Massar.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Colorado is one of three States[1] whose Employment Security Act imposes an unemployment compensation tax upon charitable institutions, the tax being measured by the amount of wages paid to the institution's employees. Colo. Rev. Stat. Ann. § 82–6–1. When the State's Department of Employment sought to enforce the tax upon wages paid Colorado-based employees of the American National Red Cross (hereinafter referred to as Red Cross), the Red Cross objected that as a "federal instrumentality" it was immune from such taxation. See *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). Tax payments aggregating more than $10,000 were made under protest, applications for refund accompanying each payment. The Department of Employment denied each such application. Thereupon the Red Cross, along with the United States as co-plaintiff, invoked the jurisdiction of a three-judge federal District Court to enjoin enforcement against it of the Colorado Employment Security Act on the ground that as applied to it, a federal instrumentality, the statute violated the Federal Constitution. See 28 U. S. C. § 2281.[2] The Department of Employment responded that the Red Cross was not a federal instrumentality, that any immunity it might have had been waived by Congress in the 1960 amendments to the Federal Unemployment Tax

[1] The other States are Alaska and Hawaii. See Alaska Stat. § 23.20.525 (c)(7) (1962); Hawaii Rev. Laws § 93–7 (i) (Supp. 1963).

[2] The statute provides that "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Act (26 U. S. C. § 3301 *et seq.*), and that in any event the Red Cross had failed to exhaust available administrative and state judicial remedies. The three-judge federal District Court ruled in favor of the Red Cross and the United States on each of these issues, ordered a refund of taxes already paid, and enjoined enforcement of the tax statute against the Red Cross. Pursuant to 28 U. S. C. § 1253,[3] the Department of Employment and its executive director sought direct review here. In setting the case for argument, we postponed consideration of questions pertaining to our jurisdiction and that of the three-judge court. 384 U. S. 949 (1966).

We are persuaded that there exist no jurisdictional barriers to our disposition of this appeal on the merits. Any challenge to the applicability of the three-judge court provision, 28 U. S. C. § 2281, is foreclosed by this Court's decision in *Query* v. *United States,* 316 U. S. 486 (1942), where the Court held that three judges were required to entertain a suit to enjoin a state tax statute sought to be enforced against an Army Post Exchange which asserted its immunity as a federal instrumentality,[4] and we do not consider that our later decision in *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965), requires a different conclusion. Nor is there compelling force in the argument, advanced by appellants, that the Tax Injunction

[3] Section 1253 authorizes direct appeal to this Court from an order granting an injunction in any proceeding "required by any Act of Congress to be heard and determined by a district court of three judges."

[4] See also *United States* v. *Georgia Pub. Serv. Comm'n,* 371 U. S. 285, 287 (1963); *Paul* v. *United States,* 371 U. S. 245, 249–250 (1963). Compare Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50 (1964), with Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 312–313 (1963).

Act (28 U. S. C. § 1341)[5] requires appellees first to exhaust their state remedies, which are alleged by appellants to be "plain, speedy and efficient." We need not decide whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341. For we conclude, in accord with an unbroken line of authority[6] and convincing evidence of legislative purpose,[7] that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. With respect to appellants' contention that the State of Colorado has not consented to suit in a federal forum even where the plaintiff is the United States, see *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), and *Ex parte Young*, 209 U. S. 123 (1908).

On the merits, we hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment. Although there is no simple test for ascertaining whether an institution is so closely related to

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[5] Section 1341 provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[6] *United States* v. *Arlington County, Commonwealth of Virginia*, 326 F. 2d 929, 931 (C. A. 4th Cir. 1964); *United States* v. *Bureau of Revenue of State of N. M.*, 291 F. 2d 677, 679 (C. A. 10th Cir. 1961); *United States* v. *Woodworth*, 170 F. 2d 1019 (C. A. 2d Cir. 1948); *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C. A. 1st Cir. 1938), cert. denied, 306 U. S. 650 (1939); *United States* v. *Livingston*, 179 F. Supp. 9, 11–12 (D. C. E. D. S. C. 1959), aff'd, 364 U. S. 281 (1960).

[7] See S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 2–3 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2–3 (1937); 81 Cong. Rec. 1416–1417 (1937).

governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. See generally, Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1 (1957). Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1 *et seq.* Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions,[8] to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe,[9] and to assist the Federal Government in providing disaster assistance to the States in time of need.[10] Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government.[11] And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the

[8] *E. g.*, Geneva Convention of August 22, 1864, For the Amelioration of the Wounded in Armies in the Field, 22 Stat. 940 (1882); Geneva Convention of July 27, 1929, For the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, 47 Stat. 2074 (1932); Geneva Convention of August 12, 1949, For the Multilateral Protection of War Victims, 6 U. S. T. & O. I. A. 3114, T. I. A. S. No. 3362.

[9] See, *e. g.*, 10 U. S. C. § 2602; 33 Stat. 600, as amended, 36 U. S. C. § 3.

[10] See 33 Stat. 600, as amended, 36 U. S. C. § 3; 64 Stat. 1109, 42 U. S. C. §§ 1855–1855g.

[11] See, *e. g.*, 46 Stat. 66, as amended, 36 U. S. C. § 13 (permanent headquarters building).

Government.[12] In those respects in which the Red Cross differs from the usual government agency—*e. g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e. g.*, national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.

Nor did Congress, in the course of amending the federal unemployment compensation tax statute in 1960, strip away any of this immunity. Certainly there was no intent to do so. Indeed, in debate on the floor of the House, Chairman Mills and Congressman Ikard of the Ways and Means Committee expressed their view, which was not controverted, that the Red Cross' immunity from state and federal unemployment compensation taxes would survive the amendments. 106 Cong. Rec. 13827 (1960). And the House Committee Report stated that no nongovernment-owned instrumentality which enjoyed immunity from the federal tax prior to 1960—the Red Cross had such an exemption—was to lose its state-tax immunity. H. R. Rep. No. 1799, 86th Cong., 2d Sess., pp. 55–56, 125 (1960). Finally, the present statutory scheme does not deprive the Red Cross of immunity. That the Red Cross enjoyed immunity prior to the 1960 amendments seems clear, and was at the time conceded by the State of Colorado.[13] Under the pre-existing scheme, § 3305 (b) of Title 26

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[12] See, *e. g.*, Proclamation of President Taft, August 22, 1911, 37 Stat. 1716; 64 Stat. 1109, 42 U. S. C. §§ 1855a (f), 1855b, 1855c; H. Con. Res. 232, 70 Stat. 832 (1956); H. R. Rep. No. 1728, 82d Cong., 2d Sess., p. 2 (1952).

[13] Such was the opinion of Assistant Attorney General McKevitt, who so informed appellant Department of Employment. See letter of the Assistant Attorney General to appellee Red Cross, dated November 21, 1960, exhibit 2, in support of appellees' motion for summary judgment below.

exempted from state taxation any federal instrumentality exempt from the federal unemployment compensation tax imposed by § 3301. The Red Cross was so exempt as the result of §§ 3306 (c)(6)(B) and 3306 (c)(8), which referred to "service performed in the employ of [a charitable organization]." As amended in 1960, § 3305 (b) continues the state-tax immunity for any "instrumentality to which section 3306 (c)(6) applies." And the latter section as amended includes employment "exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section . . . in granting such exemption." 26 U. S. C. § 3306 (c)(6)(B). Although § 3306 (c)(8), which exempts from the federal tax "service performed in the employ of a [charitable institution]," does not contain an explicit citation to § 3301, its sole function is to exempt certain employment from the reach of that section. We hold that federal instrumentalities like the Red Cross, exempted from the federal tax by virtue of § 3306 (c)(8), are likewise exempt from state taxation under § 3306 (c)(6)(B).

Accordingly, the judgment appealed from is

Affirmed.

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HEIDER, ADMINISTRATOR *v.* MICHIGAN SUGAR CO.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 48. Argued December 8, 1966.—Decided December 12, 1966.

375 Mich. 490, 134 N. W. 2d 637, dismissed.

Gregory M. Pillon argued the cause for petitioner. With him on the briefs was *Thomas C. Mayer.*

Harry M. Plotkin argued the cause for respondent. With him on the brief was *Carl H. Smith.*

PER CURIAM.

The writ is dismissed as improvidently granted.

PARKER *v.* GLADDEN, WARDEN.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 81. Argued November 9, 1966.—Decided December 12, 1966.

Petitioner was convicted of second degree murder. At a hearing on his petition for post-conviction relief the trial court found that a bailiff assigned to shepherd the sequestered jury had stated to a juror, "Oh, that wicked fellow, he is guilty," and to another juror, "If there is anything wrong [in finding him guilty] the Supreme Court will correct it." Both statements were overheard by at least one regular juror or an alternate. The trial court granted a new trial but the Oregon Supreme Court reversed. *Held:* The bailiff's statements violated the command of the Sixth Amendment, made applicable to the States by the Fourteenth, that the accused shall enjoy the right to a trial by an impartial jury and be confronted with the witnesses against him.

245 Ore. —, 407 P. 2d 246, reversed.

John H. Schafer argued the cause and filed a brief for petitioner.

David H. Blunt, Assistant Attorney General of Oregon, argued the cause for respondent. With him on the brief was *Robert Y. Thornton,* Attorney General.

PER CURIAM.

Petitioner, after his conviction for second degree murder, 235 Ore. 366, 384 P. 2d 986, filed a petition for post-conviction relief, Ore. Rev. Stat. § 138.550. At a hearing on the petition the trial court found that a court bailiff assigned to shepherd the sequestered jury, which sat for eight days, stated to one of the jurors in the presence of others while the jury was out walking on a public sidewalk: "Oh that wicked fellow [petitioner], he is guilty"; [1] and on another occasion said to another

[1] The statement was made to alternate juror Mrs. Gattman and was overheard by juror Mrs. Inwards.

juror under similar circumstances, "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it." [2] Both statements were overheard by at least one regular juror or an alternate. The trial court found "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the [petitioner]." The Supreme Court of Oregon reversed, finding that "the bailiff's misconduct did not deprive [petitioner] of a constitutionally correct trial." 245 Ore. —, 407 P. 2d 246. We granted certiorari, 384 U. S. 904. The federal question decided by Oregon's highest court is, of course, subject to final determination in this Court and we have concluded that the judgment must be reversed.

We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him. . . ." As we said in *Turner* v. *Louisiana*, 379 U. S. 466, 472–473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were "private talk," tending to reach the jury by "outside influence." *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907). We have followed the "undeviating rule," *Sheppard* v. *Maxwell*, 384 U. S. 333, 351 (1966),

[2] The statement was made to an unidentified juror and overheard by juror Mrs. Drake.

that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Kirby* v. *United States,* 174 U. S. 47, 55, 56 (1899); *In re Oliver,* 333 U. S. 257, 273 (1948); *Pointer* v. *Texas,* 380 U. S. 400 (1965).

The State suggests that no prejudice was shown and that no harm could have resulted because 10 members of the jury testified that they had not heard the bailiff's statements and that Oregon law permits a verdict of guilty by 10 affirmative votes. This overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding for eight days and nights. Moreover, the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner. Finally, one [3] of the jurors testified that she *was* prejudiced by the statements, which supports the trial court's finding "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." This finding was not upset by Oregon's highest court. Aside from this, we believe that the unauthorized conduct of the bailiff "involves such a probability that prejudice will result that it is deemed inherently lacking in due process," *Estes* v. *Texas,* 381 U. S. 532, 542–543 (1965). As we said in *Turner* v. *Louisiana, supra,* "it would be blinking reality not to recognize the extreme prejudice inherent" in such statements that reached at least three members of the jury and one alternate member. *Id.,* at 473. The State says that 10 of the jurors testified that they had not heard the statements of the bailiff. This, however, ignores the testimony that one of the statements was made to an unidentified juror, which, includ-

[3] Mrs. Inwards when recalled to the stand testified in response to a question by the court that "all in all it must have influenced me. I didn't realize it at the time."

ing Mrs. Inwards and Mrs. Drake, makes three. In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors. See *State* v. *Murray*, 164 La. 883, 888, 114 So. 721, 723.

Reversed.

MR. JUSTICE HARLAN, dissenting.

By not setting forth the background of this proceeding the Court has put seriously out of focus the constitutional issue involved in this case.

Parker was convicted of second degree murder on May 19, 1961, and sentenced to life imprisonment. On September 7, 1961, he addressed a letter to several jurors protesting his innocence, condemning his attorneys for incompetence, intimating that witnesses were coerced into lying, and chiding the jurors for being duped into finding him guilty. After affirmance of his conviction by the Supreme Court of Oregon on September 15, 1963—some two years after the jury verdict—Parker again set out to take his case to the jury. He furnished his wife with a tape recording in which he propounded a series of questions designed to uncover possible improprieties in the jury's deliberations. The jury had deliberated a long time and Parker had been told that their discussion was heated. Although unaware of any irregularities he commenced "shooting in the dark." (Tr., p. 16.) Mrs. Parker then acquired a jury list and discovered those jurors who had been most sympathetic to her husband.[1] She invited two regular jurors and an alternate to her home to listen to the recording and discuss the case. An attorney was then retained to prepare affidavits detailing the allegations before us and to institute this post-

[1] The record shows that Mrs. Parker first called juror number one, Mrs. Inwards, and upon finding her sympathetic obtained from her the names of those who had held out longest. Mrs. Inwards also informed Mrs. Parker that an alternate juror, Mrs. Gattman, was sympathetic to Parker's cause.

conviction proceeding. The statements before this Court were found to have been made by this apparently Elizabethan-tongued bailiff, but, contrary to this Court's assertion, the trial court found that these statements were only prejudicial in nature and not that they had a prejudicial effect.[2] The Oregon Supreme Court did not find the trial proceedings fundamentally unfair.

This Court finds the bailiff's remarks to be in violation of the Sixth Amendment's confrontation requirement. Although I believe that "a right of confrontation is 'implicit in the concept of ordered liberty,'" *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring opinion of HARLAN, J.), I cannot accede to the view that the Sixth Amendment is directly applicable to the States through the Fourteenth. As to the confrontation problem here asserted, I know of no case in which this Court has held that jurors must have been absolutely insulated from all expressions of opinion on the merits of the case or the judicial process at the risk of declaration of a new trial. *Irvin* v. *Dowd*, 366 U. S. 717. Even where this Court has acted in its supervisory capacity it has refused to

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[2] The trial court purported to follow the State Supreme Court's decision in *State* v. *Kristich*, 226 Ore. 240, 359 P. 2d 1106, which held that where a bailiff had communicated with a jury on a point of law prejudice would be presumed. Thus the trial court said that "if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial," and held that Parker deserved a new trial because the communication was of a prejudicial nature. The Oregon Supreme Court reversed because it held that the trial court erroneously applied the new-trial standard to a post-conviction proceeding where only error of constitutional magnitude would serve to overthrow the verdict. The Supreme Court made no specific finding on prejudice but in distinguishing *Turner* v. *Louisiana*, 379 U. S. 466, noted a "difference in degree of the out-of-courtroom influence . . . so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial." 245 Ore. —, —, 407 P. 2d 246, 249.

hold that jury contact with outside information is always a cause for overthrowing a verdict, wisely preferring to allow "each case . . . [to] turn on its special facts." *Marshall* v. *United States*, 360 U. S. 310, 312. The Court notes that these remarks were made by a state officer, but does not explain why the bailiff's official capacity would in this instance make him any more a "witness" than any other person able to communicate with the jury. Thus, though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion.

Considering this case, as I would, under the doctrine of fundamental fairness implicit in the Due Process Clause of the Fourteenth Amendment, I think a different result follows. Much reliance has been placed upon *Turner* v. *Louisiana*, 379 U. S. 466. But in *Turner* we faced a situation in which the trial court allowed two deputy sheriffs who were key witnesses to be placed in "continuous and intimate association" with the jury, and it would have been "blinking reality not to recognize the extreme prejudice inherent in this" situation. 379 U. S., at 473. There too we faced "a procedure employed by the State" involving "such a probability that prejudice will result" that we deemed it "inherently lacking in due process." *Estes* v. *Texas*, 381 U. S. 532, 542–543. Here no procedure adopted by the State is to be faulted and it seems clear to me that the rule of *Stroble* v. *California*, 343 U. S. 181, and *Irvin* v. *Dowd*, *supra*, should apply and a substantial showing of prejudice in fact must be made before a due process violation can be found.

On this basis the occurrences before us seem inconsequential to me in light of the eight-day trial and twenty-six-hour jury deliberation. And my feeling is confirmed by the extremely trivial evidence of prejudice amounting to no more than an assertion by one obviously highly

emotional and "guilt-ridden" juror that she might have been influenced without realizing it.[3] "[I]t is an impossible standard to require that tribunal [the jury] to be a laboratory, completely sterilized and freed from any external factors." *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (CLARK, J., dissenting).

The potentialities of today's decision may go far beyond what, I am sure, the Court intends. Certainly the Court does not wish to encourage convicted felons to "intimidate, beset and harass," *Stein* v. *New York*, 346 U. S. 156, 178, a discharged jury in an effort to establish possible grounds for a new trial. Our courts have always been alert to protect the sanctity of the jury process. *McDonald* v. *Pless*, 238 U. S. 264; see *Castaldi* v. *United States*, 251 F. Supp. 681. But in allowing Parker to overturn his conviction on the basis of what are no more than inconsequential incidents in an otherwise constitutionally flawless proceeding, the Court encourages others to follow his example in pursuing the jury and may be thought by some to commit federal courts in habeas corpus proceedings to interrogate the jury upon the mere allegation that a prejudicial remark has reached the ears of one of its members. *Remmer* v. *United States*, 347 U. S. 227. To any such result I cannot subscribe.

I think the Oregon Supreme Court correctly assessed the constitutional issue before us, and I would affirm its judgment.

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[3] Mrs. Inwards, who on recall testified that she must have been unconsciously influenced, denied any influence when first examined. In her further testimony she admitted that she was extremely upset by the verdict and would do anything short of committing perjury to overturn it. She stated, however, that although she had gone to the trial judge to discuss the verdict she had never mentioned the bailiff's remarks to him. In specifying that the bailiff's remarks "must" have influenced her she limited herself to declaring that they did so in connection with the pressure put on her by other jurors during the deliberations thus stating that "all in all" she "must" have been influenced.

MASON ET AL. *v.* CITY OF BILOXI.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 328. Decided December 12, 1966.

Certiorari granted; 184 So. 2d 113, reversed.

Jack Greenberg, James M. Nabrit III and *R. Jess Brown* for petitioners.

Albert Sidney Johnston, Jr., for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Mississippi is reversed. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715.

MR. JUSTICE HARLAN is of the opinion that certiorari should be granted and the case set for oral argument.

FRENCH *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 581. Decided December 12, 1966.

Appeal dismissed.

Morris Lavine for appellant.

Roger Arnebergh, Philip E. Grey and *Edward L. Davenport* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

EXLEY EXPRESS, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 644. Decided December 12, 1966.

Affirmed.

Robert L. Holtzclaw and *James T. Johnson* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro and *Robert W. Ginnane* for the United States et al.; *Earle V. White* for Albany Food Products, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

LAIRD & CO. ET AL. *v.* CHENEY, DIRECTOR OF ALCOHOLIC BEVERAGE CONTROL, ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 675. Decided December 12, 1966.

196 Kan. 675, 414 P. 2d 18, appeal dismissed.

Harry W. Colmery and *Robert E. Russell* for appellants.

Robert C. Londerholm, Attorney General of Kansas, and *Park McGee,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SCHIPANI *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 504. Certiorari denied, November 7, 1966. Petition for rehearing granted, December 12, 1966.

Certiorari granted; 362 F. 2d 825, vacated and remanded.

Jacob P. Lefkowitz for petitioner.

Solicitor General Marshall for the United States.

PER CURIAM.

Upon the suggestion of the Solicitor General and upon an independent examination of the case, the petition for a rehearing is granted, the order of this Court denying certiorari is vacated, certiorari is granted, the judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the United States District Court for the Eastern District of New York for a new trial should the Government seek to prosecute petitioner anew.

GENERAL MOTORS CORP. *v.* APPEAL BOARD OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 658. Decided December 12, 1966.

376 Mich. 135, 135 N. W. 2d 921; 378 Mich. 110, 142 N. W. 2d 686, appeal dismissed.

Aloysius F. Power for appellant.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *George M. Bourgon* and *Edward J. Setlock*, Assistant Attorneys General, for the Appeal Board of the Michigan Employment Security Commission et al.; *Abraham L. Zwerdling*, *Bruce A. Miller* and *Sheldon L. Klimist* for Stinson et al., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

TIME, INC. *v.* HILL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 22. Argued April 27, 1966.—Reargued October 18–19, 1966.—Decided January 9, 1967.

Appellee, Hill, and his family in 1952 were held hostage in their home by some escaped convicts and were ultimately released unharmed without any violence having occurred. They later moved away and appellee discouraged further publicity efforts about the incident, which had caused extensive involuntary notoriety. A novel about a hostage incident but depicting considerable violence later appeared, and was subsequently made into a play, these portrayals having been shaped by several incidents. Appellant's magazine, Life, published an account of the play, relating it to the Hill incident, describing the play as a re-enactment, and using as illustrations photographs of scenes staged in the former Hill home. Alleging that the Life article gave the knowingly false impression that the play depicted the Hill incident, appellee sued for damages under a New York statute providing a cause of action to a person whose name or picture is used by another without consent for purposes of trade or advertising. Appellant maintained that the article concerned a subject of general interest and was published in good faith. The trial court instructed the jury that liability under the statute depended upon a finding that the Life article was published, not to disseminate news, but as a fictionalized version of the Hill incident and for the purpose of advertising the play or increasing the magazine's circulation. The court also instructed the jury that punitive damages were justified if the jury found that the appellant falsely connected Hill with the play knowingly or through failure to make a reasonable investigation and that personal malice need not be found if there was reckless or wanton disregard of Hill's rights. The jury awarded compensatory and punitive damages. Though liability was sustained on appeal, the Appellate Division ordered a new trial as to damages, at which only compensatory damages were awarded, and the Court of Appeals affirmed. The New York courts have limited the reach of the statute as applied to reports of newsworthy persons or events, and have made it clear since reargument here that truth is a complete defense. (*Spahn* v. *Julian Messner, Inc.*, 18

N. Y. 2d 324, 221 N. E. 2d 543 (1966)). However, the New York courts allow recovery under the statute when such reports are "fictitious." *Held:*

1. Constitutional protections for free expression preclude applying New York's statute to redress false reports of newsworthy matters absent proof that the publisher knew of their falsity or acted in reckless disregard of the truth. Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254. Pp. 380–391.

(a) Erroneous statements about a matter of public interest, like the opening of a new play linked to an actual incident, which was the subject of the Life article, are inevitable and if innocent or merely negligent must be protected if "freedoms of expression are to have the 'breathing space' that they 'need to survive . . . .'" *Id.,* at 271–272. Pp. 388–389.

(b) But constitutional guarantees of free expression can tolerate sanctions against *calculated* falsehood without impairment of their essential function. P. 389.

2. Since the evidence in this case would support a jury finding either (1) that appellant's inaccurate portrayal of the Hill incident was innocent or merely negligent or (2) that it was recklessly untrue or knowingly false, the trial court's failure properly to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article constituted reversible error. Pp. 391–397.

3. A declaration would be unwarranted that the New York statute is unconstitutional on its face even if construed by the New York courts to impose liability without proof of knowing or reckless falsity because the New York courts have been assiduous to construe the statute to avoid invasion of freedom of speech and of the press. P. 397.

15 N. Y. 2d 986, 207 N. E. 2d 604, reversed and remanded.

Harold R. Medina, Jr., reargued the cause for appellant. With him on the briefs was *Victor M. Earle III.*

Richard M. Nixon reargued the cause and filed a brief for appellee.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Barry*

Mahoney and *Brenda Soloff*, Assistant Attorneys General, filed a brief for the Attorney General of the State of New York, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether appellant, publisher of Life Magazine, was denied constitutional protections of speech and press by the application by the New York courts of §§ 50–51 of the New York Civil Rights Law [1] to award appellee damages on allegations

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[1] The complete text of the New York Civil Rights Law §§ 50–51 is as follows:

"§ 50. *Right of privacy*

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

"§ 51. *Action for injunction and for damages*

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or

that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

The article appeared in Life in February 1955. It was entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The text of the article reads as follows:

> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.
>
> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

The pictures on the ensuing two pages included an enactment of the son being "roughed up" by one of the convicts, entitled "brutish convict," a picture of the

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picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

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daughter biting the hand of a convict to make him drop a gun, entitled "daring daughter," and one of the father throwing his gun through the door after a "brave try" to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts in their suburban, Whitemarsh, Pennsylvania, home for 19 hours on September 11–12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, Joseph Hayes' novel, The Desperate Hours, was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family's suburban home. But, unlike Hill's experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled The Desperate Hours, and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages under §§ 50–51 on allegations that the Life article was intended to, and did, give the impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant ". . . was false and untrue." Appellant's defense was that

the article was "a subject of legitimate news interest," "a subject of general interest and of value and concern to the public" at the time of publication, and that it was "published in good faith without any malice whatsoever . . . ." A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee $50,000 compensatory and $25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. The court said as to liability:

> "Although the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest." 18 App. Div. 2d 485, 489, 240 N. Y. S. 2d 286, 290.

At the new trial on damages, a jury was waived and the court awarded $30,000 compensatory damages without punitive damages.[2]

The New York Court of Appeals affirmed the Appellate Division "on the majority and concurring opinions

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[2] Initially, appellee's wife was joined in the action, and was awarded $75,000 compensatory and $25,000 punitive damages by the jury. However, her action was apparently dismissed by stipulation prior to remand, because the action has since proceeded solely upon appellee's judgment.

at the Appellate Division," two judges dissenting. 15 N. Y. 2d 986, 207 N. E. 2d 604. We noted probable jurisdiction of the appeal to consider the important constitutional questions of freedom of speech and press involved. 382 U. S. 936. After argument last Term, the case was restored to the docket for reargument, 384 U. S. 995. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

I.

Since the reargument, we have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court's construction of the statute. It is the opinion of Judge Keating for the court in *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543 (1966). The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442. *Roberson* was an action against defendants for adorning their flour bags with plaintiff's picture without her consent. It was grounded upon an alleged invasion of a "right of privacy," defined by the Court of Appeals to be "the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers . . . ." 171 N. Y., at 544, 64 N. E., at 443. The Court of Appeals traced the theory to the celebrated article of Warren and Brandeis, entitled The Right to Privacy, published in 1890. 4 Harv. L. Rev. 193.[3] The

[3] The various facets of this "right" have been the subject of much comment. See, *e. g.*, Beaney, The Constitutional Right to Privacy in the Supreme Court, 1962 Sup. Ct. Rev. 212; Prosser, Privacy, 48 Calif. L. Rev. 383 (1960); Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's (Part I), 66 Col. L. Rev. 1003

Court of Appeals, however, denied the existence of such a right at common law but observed that "[t]he legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." 171 N. Y., at 545, 64 N. E., at 443. The legislature enacted §§ 50–51 in response to that observation.

Although "Right of Privacy" is the caption of §§ 50–51, the term nowhere appears in the text of the statute itself. The text of the statute appears to proscribe only conduct of the kind involved in *Roberson,* that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent.[4] An application of that limited scope would present different questions of violation of the constitutional protections for speech and press. Compare *Valentine* v. *Chrestensen,* 316 U. S. 52, with *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265–266.

The New York courts have, however, construed the statute to operate much more broadly. In *Spahn* the Court of Appeals stated that "Over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose . . . ." 18 N. Y. 2d, at 327, 221 N. E. 2d, at 544. Specifically,

(1966); Feinberg, Recent Developments in the Law of Privacy, 48 Col. L. Rev. 713, 717–726 (1948). The latest collection of articles appears in 31 Law & Contemp. Prob. 251–435 (1966). The commentary relates not so much to the assertion of constitutional protections against intrusions by government, see *Griswold* v. *Connecticut,* 381 U. S. 479, as to rights of action for injunctive relief or damages to combat intrusive behavior in the private sector of society.

[4] Utah's statute was modeled on New York's and, following early New York decisions, the Utah Supreme Court has construed it to afford a cause of action only in such cases. *Donahue* v. *Warner Bros. Pictures Dist. Corp.,* 2 Utah 2d 256, 272 P. 2d 177 (1954).

it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application.[5] "[E]ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." *Id.*, 18 N. Y. 2d, at 328, 221 N. E. 2d, at 544–545.

In the light of questions that counsel were asked to argue on reargument,[6] it is particularly relevant that the

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[5] See, *e. g.*, *Sidis* v. *F–R Pub. Corp.*, 113 F. 2d 806 (C. A. 2d Cir.), cert. denied, 311 U. S. 711 (1940); *Sweenek* v. *Pathe News, Inc.*, 16 F. Supp. 746 (D. C. E. D. N. Y. 1936); *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 106 N. Y. S. 2d 553 (1951), aff'd, 304 N. Y. 354, 107 N. E. 2d 485 (1952); *Molony* v. *Boy Comics Pubs., Inc.*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1950); *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1919); *Colyer* v. *Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (1914); *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd, 272 App. Div. 759, 69 N. Y. S. 2d 432 (1947); *Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 295 N. Y. Supp. 382 (1937).

[6] "Upon reargument, counsel are requested to discuss in their further briefs and oral arguments, in addition to the other issues, the following questions:

"(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?

"(2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

" 'However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but

Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. The opinion states: "The factual reporting of newsworthy persons and events is in the public interest and is protected." 18 N. Y. 2d, at 328, 221 N. E. 2d, at 545.[7] Constitutional questions which might

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rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized.'" 384 U. S. 995.

[7] This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Sidis* v. *F–R Pub. Corp.*, 113 F. 2d 806, 809 (C. A. 2d Cir.), cert. denied, 311 U. S. 711 (1940). Cf. *Garner* v. *Triangle Pubs., Inc.*, 97 F. Supp. 546, 550 (D. C. S. D. N. Y. 1951); Restatement, Torts § 867, comment *d* (1939). See *id.*, illust. 6. This case presents no question whether truthful publication of such matter could be constitutionally proscribed.

It has been said that a "right of privacy" has been recognized at common law in 30 States plus the District of Columbia and by statute in four States. See Prosser, Law of Torts 831–832 (3d ed. 1964). Professor Kalven notes, however, that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him, "it has been agreed that there is a generous privilege to serve the public interest in news. . . . What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?" Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 Law & Contemp. Prob. 326, 335–336 (1966). Some representative cases in which the State "right of privacy" was held to give way to the right of the press to publish matters of public interest are *Afro-American Pub. Co.* v. *Jaffe*, 125 U. S. App. D. C. 70, 366 F. 2d 649 (1966); *Wagner* v. *Fawcett Pubs.*, 307 F. 2d 409 (C. A. 7th

arise if truth were not a defense are therefore of no concern. Cf. *Garrison* v. *Louisiana*, 379 U. S. 64, 72–75.

But although the New York statute affords "little protection" to the "privacy" of a newsworthy person, "whether he be such by choice or involuntarily" [8] the statute gives him a right of action when his name, picture, or portrait is the subject of a "fictitious" report or article.[9]

Cir. 1962); *Jenkins* v. *Dell Pub. Co.*, 251 F. 2d 447 (C. A. 3d Cir. 1958); *Elmhurst* v. *Pearson*, 80 U. S. App. D. C. 372, 153 F. 2d 467 (1946); *Thompson* v. *Curtis Pub. Co.*, 193 F. 2d 953 (C. A. 3d Cir. 1952); *Samuel* v. *Curtis Pub. Co.*, 122 F. Supp. 327 (D. C. N. D. Cal. 1954); *Miller* v. *N. B. C.*, 157 F. Supp. 240 (D. C. Del. 1957); *Berg* v. *Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. C. Minn. 1948); *Smith* v. *Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); *Smith* v. *Suratt*, 7 Alaska 416 (1926); *Metter* v. *Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Barbieri* v. *News-Journal Co.*, — Del. —, 189 A. 2d 773 (1963); *Jacova* v. *Southern Radio & T. V. Co.*, 83 So. 2d 34 (Fla. 1955); *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S. E. 2d 344 (1956); *Buzinski* v. *Do-All Co.*, 31 Ill. App. 2d 191, 175 N. E. 2d 577 (1961); *Jones* v. *Herald Post Co.*, 230 Ky. 227, 18 S. W. 2d 972 (1929); *Kelley* v. *Post Pub. Co.*, 327 Mass. 275, 98 N. E. 2d 286 (1951); *Martin* v. *Dorton*, 210 Miss. 668, 50 So. 2d 391 (1951); *Hubbard* v. *Journal Pub. Co.*, 69 N. M. 473, 368 P. 2d 147 (1962); *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A. 2d 860 (1954); *Meetze* v. *Associated Press*, 230 S. C. 330, 95 S. E. 2d 606 (1956); *Truxes* v. *Kenco Enterprises*, 80 S. D. 104, 119 N. W. 2d 914 (1963). See Restatement, Torts § 867, comment *d* (1939).

[8] "One of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection," *Spahn*, *supra*, at 328, 221 N. E. 2d, at 545.

[9] *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913); *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 19 App. Div. 2d 865, 244 N. Y. S. 2d 1 (1963); *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1950); *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd, 272 App. Div. 759, 69 N. Y. S. 2d 432 (1947); *Lahiri* v. *Daily Mirror, Inc.*, 162

Spahn points up the distinction. *Spahn* was an action under the statute brought by the well-known professional baseball pitcher, Warren Spahn. He sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The trial judge had found that "the record unequivocally estab-

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Misc. 776, 295 N. Y. Supp. 382 (1937). The doctrine of "fictionalization" has been applied where there is no statute. See, *e. g.*, *Leverton* v. *Curtis Pub. Co.*, 192 F. 2d 974 (C. A. 3d Cir. 1951); *Hazlitt* v. *Fawcett Pubs.*, 116 F. Supp. 538 (D. C. Conn. 1953); *Garner* v. *Triangle Pubs., Inc.*, 97 F. Supp. 546 (D. C. S. D. N. Y. 1951). Commentators have likened the interest protected in those "privacy" cases which focus upon the falsity of the matter to that protected in cases of libel and slander—injury to the reputation. See Prosser, Privacy, 48 Calif. L. Rev. 383, 398–401 (1960); Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093 (1962). But see Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 991–993 (1964). Many "right of privacy" cases could in fact have been brought as "libel per quod" actions, and several have been brought on both grounds. See, *e. g.*, *Hazlitt* v. *Fawcett Pubs.*, *supra*; *Freeman* v. *Busch Jewelry Co.*, 98 F. Supp. 963 (D. C. N. D. Ga. 1951); *Peay* v. *Curtis Pub. Co.*, 78 F. Supp. 305 (D. C. D. C. 1948); *Foster-Milburn Co.* v. *Chinn*, 134 Ky. 424, 120 S. W. 364 (1909). Although not usually thought of in terms of "right of privacy," all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the "right of privacy" cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage. See Wade, *supra*, at 1124. Moreover, as *Spahn* illustrates, the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery. Our decision today is not to be taken to decide any constitutional questions which may be raised in "libel per quod" actions involving publication of matters of public interest, or in libel actions where the plaintiff is not a public official. Nor do we intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices.

lishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages . . . ." 43 Misc. 2d 219, 232, 250 N. Y. S. 2d 529, 542. The Court of Appeals sustained the holding that in these circumstances the publication was proscribed by § 51 of the Civil Rights Law and was not within the exceptions and restrictions for newsworthy events engrafted onto the statute. The Court of Appeals said:

> "But it is erroneous to confuse privacy with 'personality' or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected . . . . Thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his 'personality' may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography." *Spahn, supra,* at 328, 221 N. E. 2d, at 545.

As the instant case went to the jury, appellee, too, was regarded to be a newsworthy person "substantially without a right to privacy" insofar as his hostage experience was involved, but to be entitled to his action insofar as that experience was "fictionalized" and "exploited for the defendants' commercial benefit." "Fictionalization," the *Spahn* opinion states, "is the heart of the cases in point." 18 N. Y. 2d, at 328, 221 N. E. 2d, at 545.

The opinion goes on to say that the "establishment of minor errors in an otherwise accurate" report does not prove "fictionalization." Material and substantial falsification is the test. However, it is not clear whether

proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth is also required. In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we held that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved. The *Spahn* opinion reveals that the defendant in that case relied on *New York Times* as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that *New York Times* had no application. The court, after distinguishing the cases on the ground that *Spahn* did not deal with public officials or official conduct, then says, "The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect." 18 N. Y. 2d, at 329, 221 N. E. 2d, at 546.

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals.[10] We hold that the constitutional protections for speech and press preclude the application

[10] Of course *Spahn* is not before us and we in no wise imply any view of the merits of the judgment or remedy afforded the plaintiff in that case. Our reliance is solely on Judge Keating's opinion as an aid to understanding the construction placed on the statute by the New York courts.

of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California*, 314 U. S. 252, 269. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Winters* v. *New York*, 333 U. S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ". . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ." *New York Times Co.* v. *Sullivan*, *supra*, at 271–272. As James Madison said, "Some degree of abuse is inseparable from

the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.). We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer . . . wider of the unlawful zone," *New York Times Co.* v. *Sullivan*, 376 U. S., at 279; see also *Speiser* v. *Randall*, 357 U. S. 513, 526; *Smith* v. *California*, 361 U. S. 147, 153–154; and thus "create the danger that the legitimate utterance will be penalized." *Speiser* v. *Randall*, *supra*, at 526.

But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no im-

munity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us. What we said in *Garrison* v. *Louisiana*, *supra*, at 75, is equally applicable:

> "The use of calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co.* v. *Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclu-

sion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times.* Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt* v. *Baer,* 383 U. S. 75, 91 (STEWART, J., concurring). Moreover, a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual. Different considerations might arise concerning the degree of "waiver" of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

II.

Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false. The relevant testimony is as follows:

Joseph Hayes, author of the book, also wrote the play. The story theme was inspired by the desire to write about "true crime" and for years before writing the book, he collected newspaper clippings of stories of hostage incidents. His story was not shaped by any single incident, but by several, including incidents which occurred in California, New York, and Detroit. He said that he did not consciously portray any member of the Hill fam-

ily, or the Hill family's experience, although admitting that "in a very direct way" the Hill experience "triggered" the writing of the book and the play.

The Life article was prepared at the direction and under the supervision of its entertainment editor, Prideaux. He learned of the production of the play from a news story. The play's director, Robert Montgomery, later suggested to him that its interesting stage setting would make the play a worthwhile subject for an article in Life. At about the same time, Prideaux ran into a friend of author Hayes, a free-lance photographer, who told Prideaux in casual conversation that the play had a "substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia." As the play was trying out in Philadelphia, Prideaux decided to contact the author. Hayes confirmed that an incident somewhat similar to the play had occurred in Philadelphia, and agreed with Prideaux to find out whether the former Hill residence would be available for the shooting of pictures for a Life article. Prideaux then met with Hayes in Philadelphia where he saw the play and drove with Hayes to the former Hill residence to test its suitability for a picture story. Neither then nor thereafter did Prideaux question Hayes about the extent to which the play was based on the Hill incident. "A specific question of that nature was never asked, but a discussion of the play itself, what the play was about, in the light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that."

Prideaux sent photographers to the Hill residence for location photographs of scenes of the play enacted in the home, and proceeded to construct the text of the article.

In his "story file" were several news clippings about the Hill incident which revealed its nonviolent character, and a New York Times article by Hayes in which he stated that the play "was based on various news stories," mentioning incidents in New York, California, Detroit and Philadelphia.

Prideaux's first draft made no mention of the Hill name except for the caption of one of the photographs. The text related that a true story of a suburban Philadelphia family had "sparked off" Hayes to write the novel, that the play was a "somewhat fictionalized" account of the family's heroism in time of crisis. Prideaux's research assistant, whose task it was to check the draft for accuracy, put a question mark over the words "somewhat fictionalized." Prideaux testified that the question mark "must have been" brought to his attention, although he did not recollect having seen it. The draft was also brought before the copy editor, who, in the presence of Prideaux, made several changes in emphasis and substance. The first sentence was changed to focus on the Hill incident, using the family's name; the novel was said to have been "inspired" by that incident, and the play was referred to as a "re-enactment." The words "somewhat fictionalized" were deleted.

Prideaux labeled as "emphatically untrue" defense counsel's suggestion during redirect examination that from the beginning he knew that the play had no relationship to the Hill incident apart from being a hostage incident. Prideaux admitted that he knew the play was "between a little bit and moderately fictionalized," but stated that he thought beyond doubt that the important quality, the "heart and soul" of the play, was the Hill incident.

The jury might reasonably conclude from this evidence—particularly that the New York Times article

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was in the story file, that the copy editor deleted "somewhat fictionalized" after the research assistant questioned its accuracy, and that Prideaux admitted that he knew the play was "between a little bit and moderately fictionalized"—that Life knew the falsity of, or was reckless of the truth in, stating in the article that "the story re-enacted" the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the free-lance photographer that linked the play to an incident in Philadelphia, that the author Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the "heart and soul" of the play was the Hill incident.[11]

III.

We do not think, however, that the instructions confined the jury to a verdict of liability based on a finding that the statements in the article were made with knowledge of their falsity or in reckless disregard of the truth. The jury was instructed that liability could not be found under §§ 50–51 "merely because of some incidental mistake of fact, or some incidental incorrect statement," and that a verdict of liability could rest only on findings that (1) Life published the article, "not to disseminate news, but was using plaintiffs' names, in connection with a fictionalized episode as to plaintiffs' relationship to The Desperate Hours"; the Court variously restated this "fictionalization" requirement in terms such as whether appellant "altered or changed the true facts concerning

[11] Where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood. Cf. *New York Times Co.* v. *Sullivan*, *supra*, 284–285.

plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially fiction or a fictionalized version . . . ," whether the article constituted "fiction," or was "fictionalized"; and that (2) the article was published to advertise the play or "for trade purposes." This latter purpose was variously defined as one "to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit," "to increase circulation or enhance the standing of the magazine with its readers," and "for the publisher's profits through increased circulation, induced by exploitation of the plaintiffs."

The court also instructed the jury that an award of punitive damages was justified if the jury found that the appellant falsely connected appellee to the play "knowingly or through failure to make a reasonable investigation," adding "You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find a reckless or wanton disregard of the plaintiffs' rights."

Appellee argues that the instructions to determine whether Life "altered or changed" the true facts, and whether, apart from incidental errors, the article was a "substantial fiction" or a "fictionalized version" were tantamount to instructions that the jury must find that Life knowingly falsified the facts. We do not think that the instructions bear that interpretation, particularly in light of the marked contrast in the instructions on compensatory and punitive damages. The element of "knowingly" is mentioned only in the instruction that punitive damages must be supported by a finding that Life falsely connected the Hill family with the play "knowingly or through failure to make a reasonable investigation." Moreover, even as to punitive damages, the instruction that such damages were justified on the

basis of "failure to make a reasonable investigation" is an instruction that proof of negligent misstatement is enough, and we have rejected the test of negligent misstatement as inadequate.[12] Next, the trial judge plainly did not regard his instructions as limiting the jury to a verdict of liability based on a finding of knowing or reckless falsity; he denied appellant's motion to dismiss after the close of the evidence because he perceived that it was for the jury to find "whether the Life article was true or whether an inference could be obtained from reading it that it was not true." This implies a view that "fictionalization" was synonymous with "falsity" without regard to knowledge or even negligence, except for the purpose of an award of punitive damages. Finally, nothing in the New York cases decided at the time of trial limited liability to cases of knowing or reckless falsity and *Spahn*, decided since, has left the question in doubt.[13]

The requirement that the jury also find that the article was published "for trade purposes," as defined in

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[12] Although the court qualified this instruction by requiring a finding of "reckless or wanton disregard of the plaintiffs' rights" in absence of a finding of "actual ill will or personal malice," this reasonably could have been taken by the jury to relate, not to truth or falsity, but to appellant's attitude toward appellee's privacy. Therefore even this instruction would have been constitutionally infirm. Even had the Appellate Division not found prejudicial error affecting the jury's award of punitive damages, the judgment before us could not be sustained on the basis of the jury's finding on that issue.

[13] The Appellate Division in *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 220, 260 N. Y. S. 2d 451, 454 (1965), stated that the concept of fictionalization rested on a "distinction between an *intentionally* fictionalized treatment and a straight factual treatment (subject to inadvertent or superficial inaccuracies) . . . ." (Emphasis supplied.) In light of the Court of Appeals opinion, we cannot accept this as an accurate statement of New York law.

the charge, cannot save the charge from constitutional infirmity. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502; see *New York Times Co.* v. *Sullivan*, 376 U. S., at 266; *Smith* v. *California*, 361 U. S. 147, 150; cf. *Ex parte Jackson*, 96 U. S. 727, 733; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Lovell* v. *Griffin*, 303 U. S. 444.

IV.

The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity.[14] Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

[14] Appellant further contends that the threat of criminal penalty invalidates the statute. However, there have been only two cases of criminal proceedings under the statute and both resulted in dismissal. *People* v. *Charles Scribner's Sons*, 205 Misc. 818, 130 N. Y. S. 2d 514 (1954); *People* v. *McBride & Co.*, 159 Misc. 5, 288 N. Y. Supp. 501 (1936). There is therefore little realistic threat of prosecution. Cf. *United States* v. *Raines*, 362 U. S. 17, 20–24 (1960).

The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversal of the judgment in this case based on the grounds and reasons stated in the Court's opinion. I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in *New York Times Co.* v. *Sullivan,* 376 U. S. 254. The Court's opinion decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to the Court's opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S., at 293 (concurring opinion); *Rosenblatt* v. *Baer,* 383 U. S. 75, 94 (concurring and dissenting opinion).

I.

I acquiesce in the application here of the narrower constitutional view of *New York Times* with the belief that this doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one. The words "malicious" and particularly "reckless disregard of the truth" can never serve as effective substitutes for the First Amendment words: ". . . make no law . . . abridging the freedom of speech, or of the press . . . ." Experience, I think, is bound to prove that First Amendment freedoms can

no more be permanently diluted or abridged by this Court's action than could the Sixth Amendment's guarantee of right to counsel. I think the fate that befell *Betts* v. *Brady*, 316 U. S. 455 (cf. *Gideon* v. *Wainwright*, 372 U. S. 335), is already foreseeable, even if only dimly, for the *New York Times'* dilution of First Amendment rights.

II.

I think it not inappropriate to add that it would be difficult, if not impossible, for the Court ever to sustain a judgment against Time in this case without using the recently popularized weighing and balancing formula. Some of us have pointed out from time to time that the First Amendment freedoms could not possibly live with the adoption of that Constitution-ignoring-and-destroying technique,[1] when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. That freedom was written into the Constitution and that Constitution is or should be binding on judges as well as other public officers. The "weighing" doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always

[1] See, *e. g.*, *In re Anastaplo*, 366 U. S. 82, 97 (dissenting opinion); *Braden* v. *United States*, 365 U. S. 431, 438 (dissenting opinion); *Barenblatt* v. *United States*, 360 U. S. 109, 140–145 (dissenting opinion).

dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up.

Finally, if the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed.[2] If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms. If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom, inherent and certain in this "weighing process." Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy

[2] Jefferson wrote that the purpose of the First Amendment is ". . . guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals." 8 Jefferson, Works 464–465 (Ford ed. 1904).

of the newsworthy facts.[3] Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

MR. JUSTICE DOUGLAS, concurring.

As intimated in my separate opinion in *Rosenblatt* v. *Baer*, 383 U. S. 75, 88, and in the opinion of my Brother BLACK in the same case, *id.*, at 94, state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain. The episode around which this book was written had been news of the day for some time. The most that can be said is that the novel, the play, and the magazine article revived that interest. A fictionalized treatment of the event is, in my view, as much in the public domain as would be a watercolor of the assassination of a public official. It seems to me irrelevant to talk of any right of privacy in this context. Here a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Such privacy as a person normally has ceases when his life has ceased to be private.

Once we narrow the ambit of the First Amendment, creative writing is imperiled and the "chilling effect" on free expression which we feared in *Dombrowski* v. *Pfister*,

[3] See, for example, *Curtis Publishing Co.* v. *Butts*, 351 F. 2d 702 ($3,000,000 libel judgment, cut to $460,000 on appeal), cert. granted, *post*, p. 811; *Associated Press* v. *Walker*, 393 S. W. 2d 671 (Tex. Civ. App.) ($500,000 libel judgment), cert. granted, *post*, p. 812; *New York Times Co.* v. *Sullivan*, 376 U. S. 254 ($500,000 libel judgment), reversed.

380 U. S. 479, 487,* is almost sure to take place. That is, I fear, the result once we allow an exception for "knowing or reckless falsity." Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day. The exception for "knowing or reckless falsity" is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments. But as indicated in my Brother BLACK's opinion I have joined the Court's opinion in order to make possible an adjudication that controls this litigation. Cf. Mr. Justice Rutledge, concurring, *Screws* v. *United States,* 325 U. S. 91, 113, 134.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

While I find much with which I agree in the opinion of the Court, I am constrained to express my disagreement with its view of the proper standard of liability to be applied on remand. Were the jury on retrial to find negligent rather than, as the Court requires, reckless or knowing "fictionalization," I think that federal constitutional requirements would be met.

I.

The Court's opinion demonstrates that the fictionalization doctrine upon which New York premises liability is one which would strip newsworthy material, otherwise protected, of its constitutional shield upon a mere

*And see *Baggett* v. *Bullitt,* 377 U. S. 360; *NAACP* v. *Button,* 371 U. S. 415.

showing of substantial falsity. I agree that the compensatory damage instruction given by the trial court required only such a determination and a finding of "commercial purpose" to sustain liability. And reading the opinion of the Appellate Division in the light of other New York decisions I believe that this was the theory upon which the jury finding was sustained.[1] True, the trial court told the jury that it must find that the appellant "altered or changed the true facts." But it did not specify whether this alteration or change would have to be reckless or negligent, or whether innocent variation from the facts as found by the jury would suffice for the award of damages. Clearly knowing falsification was not required, for the court refused appellant's request to charge that the jury must find in its favor unless it found knowing falsification.

The instructions on punitive damages required the jury to find at least "failure to make a reasonable investigation," in my view a crucial determination. However, the entire damage award was set aside as excessive by

[1] The majority in the New York Appellate Division denied that the article could "be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information . . . ." They added that "points of similarity in the book and the occurrence . . . justified neither the identification nor the commercial exploitation of plaintiffs' name and family with the play." Justice Rabin, concurring, agreed that the subject could have been presented without liability "albeit the presentation of such newsworthy material increases the publisher's circulation." The New York Court of Appeals affirmed "on the majority and concurring opinions at the Appellate Division." The decision below seems to have ample support in New York law. See, *e. g.*, *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543; *Binns* v. *Vitagraph Co.*, 147 App. Div. 783, 132 N. Y. Supp. 237, aff'd, 210 N. Y. 51, 103 N. E. 1108; *Youssoupoff* v. *CBS, Inc.*, 41 Misc. 2d 42, 244 N. Y. S. 2d 701, aff'd, 19 App. Div. 2d 865, 244 N. Y. S. 2d 1; *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd, 272 App. Div. 759, 69 N. Y. S. 2d 432.

the Appellate Division which found it unduly influenced by inflammatory evidence. On remand for reconsideration of damages, only a compensatory award was made. This was the award affirmed by the Court of Appeals in the decision we are reviewing. With the case in this posture, I do not think it can fairly be said that there has been a binding jury interpretation of the degree of fault involved in the fictionalization and I agree with the Court that the conduct involved would bear a variety of interpretations.

Like the Court, I consider that only a narrow problem is presented by these facts. To me this is not "privacy" litigation in its truest sense. See Prosser, Law of Torts § 112; Silver, Privacy and the First Amendment, 34 Ford. L. Rev. 553; but see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962. No claim is made that there was any intrusion upon the Hills' solitude or private affairs in order to obtain information for publication. The power of a State to control and remedy such intrusion for newsgathering purposes cannot be denied, cf. *Mapp* v. *Ohio*, 367 U. S. 643, but is not here asserted. Similarly it may be strongly contended that certain facts are of such limited public interest and so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication. *Feeney* v. *Young*, 191 App. Div. 501, 181 N. Y. Supp. 481; see *Sidis* v. *F–R Pub. Corp.*, 113 F. 2d 806, 808. But the instructions to the jury, the opinions in the New York appellate courts, and indeed the arguments advanced by both sides before this Court all recognize that the theme of the article in question was a perfectly proper one and that an article of this type could have been prepared without liability. *Winters* v. *New York*, 333 U. S. 507, 510. The record is replete with articles commenting on the genesis of The Desperate Hours, one of which was pre-

pared by the author himself and used by appellee to demonstrate the supposed falsity of the Life piece. Finally no claim is made that appellant published the article to advance a commercial interest in the play. There is no evidence to show that Time, Inc., had any financial interest in the production or even that the article was published as an advertisement. Thus the question whether a State may apply more stringent limitations to the use of the personality in "purely commercial advertising" is not before the Court. See *Valentine* v. *Chrestensen*, 316 U. S. 52.

II.

Having come this far in step with the Court's opinion, I must part company with its sweeping extension of the principles of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. It was established in *New York Times* that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine, *Rosenblatt* v. *Baer*, 383 U. S. 75, *Garrison* v. *Louisiana*, 379 U. S. 64, have never found independent value in false publications [2] nor any reason for their protection except to add to the protection of truthful communication. And the Court has been quick to note that where private actions are involved the social interest in individual protection from falsity may be substantial. *Rosenblatt* v.

[2] The passage from *Garrison* v. *Louisiana*, *supra*, quoted in the opinion of the Court makes clear that the only interest in protecting falsehood is to give added "breathing space" to truth. It is undeniable that falsity may be published, especially in the political arena, with what may be considered "good" motives—for example a good-faith belief in the absolute necessity of defeating an "evil" candidate. But the Court does not remove state power to control such conduct, thus underlining the strong social interest in discouraging false publication.

Baer, supra, at 86–87, n. 13. Thus I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in *New York Times.* The first is the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration. Certainly that is illustrated here in the difficulty to be encountered in making a precise description of the relationship between the Hill incident and The Desperate Hours. The second is the Court's recognition that in many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship. Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 310. "The marketplace of ideas" where it functions still remains the best testing ground for truth.

But these arguments against suppressing what is found to be "false" on that ground alone do not negative a State's interest in encouraging the publication of well researched materials more likely to be true. Certainly it is within the power of the State to use positive means—the provision of facilities [3] and training of students [4]—

[3] Thus the State may take land for the construction of library facilities. *E. g., Hayford* v. *Bangor,* 102 Me. 340, 66 A. 731; *Laird* v. *Pittsburg,* 205 Pa. 1, 54 A. 324.

[4] Thus many state universities have professional schools of journalism. See 3 Department of Health, Educ. & Welfare, Education Directory—Higher Education.

to further this end. The issue presented in this case is the constitutionality of a State's employment of sanctions to accomplish that same goal. The Court acknowledges that sanctions may be employed against knowing or reckless falsehoods but would seem to grant a "talismanic immunity" to all unintentional errors. However, the distinction between the facts presented to us here and the situation at issue in the *New York Times* case and its progeny casts serious doubt on that grant of immunity and calls for a more limited "breathing space" than that granted in criticism of public officials.

First, we cannot avoid recognizing that we have entered an area where the "marketplace of ideas" does not function and where conclusions premised on the existence of that exchange are apt to be suspect. In *Rosenblatt* v. *Baer, supra,* the Court made the *New York Times* rationale operative where "the public has an independent interest in the qualifications and performance of the person who holds it [government position], beyond the general public interest in the qualifications and performance of all government employees . . . ." *Id.,* at 86. In elaboration the Court said: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.,* at 87, n. 13. To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is "occasioned by the particular charges in controversy" and the matter is not one in which the public has an "independent interest." It would be unreasonable to assume that Mr. Hill could find a forum for

making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society. Thus the state interest in encouraging careful checking and preparation of published material is far stronger than in *New York Times*. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.[5]

Second, there is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In *New York Times* we acknowledged public officials to be a breed from whom hardiness to exposure to charges, innuendoes, and criticisms might be demanded and who voluntarily assumed the risk of such things by entry into the public arena.

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[5] See Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085; *Beauharnais* v. *Illinois*, 343 U. S. 250; *State* v. *Klapprott*, 127 N. J. L. 395, 22 A. 2d 877. And despite the Court's denial that the opportunity for rebuttal is germane, it must be the circulation of falsity and the harm stemming from it which lead the Court to allow the imposition of liability at all. For the Court finds the subject of the Life article "a matter of public interest." And it states that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." Thus it could not permit New York to allow compensation for mere exposure unless it is holding, as I am sure it is not, that the presence of some reckless falsehood in written material strips it of all constitutional protection. The Court's suggestion that Mr. Hill might not be anxious to rebut the falsehood because it might increase his harm from exposure is equally applicable to libel actions where the opportunity to rebut may be limited by fear of reiterating the libel. And this factor emphasizes, rather than lessens, the state interest in discouraging falsehood for it increases the likelihood that falsity will continue to circulate to the detriment of some when truth should be encouraged "for the benefit of all of us."

376 U. S., at 273. But Mr. Hill came to public attention through an unfortunate circumstance not of his making rather than his voluntary actions and he can in no sense be considered to have "waived" any protection the State might justifiably afford him from irresponsible publicity. Not being inured to the vicissitudes of journalistic scrutiny such an individual is more easily injured and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him because it is not accustomed to seeing his name in the press and expects only a disinterested report.

The coincidence of these factors in this situation leads me to the view that a State should be free to hold the press to a duty of making a reasonable investigation of the underlying facts and limiting itself to "fair comment" [6] on the materials so gathered. Theoretically, of course, such a rule might slightly limit press discussion of matters touching individuals like Mr. Hill. But, from a pragmatic standpoint, until now the press, at least in

[6] A negligence standard has been applied in libel actions both where the underlying facts are alleged to be libelous, *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, and where comment is the subject of the action, *Clancy* v. *Daily News Corp.*, 202 Minn. 1, 277 N. W. 264. Similarly the press should not be constitutionally insulated from privacy actions brought by parties in the position of Mr. Hill when reasonable care has not been taken in ascertaining or communicating the underlying facts or where the publisher has not kept within the traditional boundaries of "fair comment" with relation to underlying facts and honest opinion. See Prosser, Law of Torts § 110, at 815–816. Similar standards of reasonable investigation and presentation have long been applied in misrepresentation cases. See, *e. g.*, *International Products Co.* v. *Erie R. Co.*, 244 N. Y. 331, 155 N. E. 662; *Nash* v. *Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N. E. 1039. Under such a standard the fact that the publication involved in this case was not defamatory would enter into a determination of the amount of care which would have been reasonable in the preparation of the article.

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New York, labored under the more exacting handicap of the existing New York privacy law and has certainly remained robust. Other professional activity of great social value is carried on under a duty of reasonable care [7] and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The "freedom of the press" guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.[8] The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it. I would remand the case to the New York courts for possible retrial under that principle.

A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the *New York*

[7] See, *e. g.*, McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549; Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755. It may be argued that other professions are distinguishable because practitioners may insure against liability. But this course is also open to the press. Developments in the Law, Defamation, 69 Harv. L. Rev. 875, 906.

[8] This Court has never held that the press has an absolute privilege to publish falsity. There is nothing in the history of the First Amendment, or the Fourteenth, to indicate that the authors contemplated restrictions on the ability of private persons to seek legal redress for press-inflicted injury. See generally Levy, Legacy of Suppression; Duniway, The Development of Freedom of the Press in Massachusetts. The Founders rejected an attempt by Madison to add to Art. I, § 10, a guarantee of freedom of the press against state action. The main argument advanced against it was that it would unduly interfere with the proper powers of the States. See 5 Madison's Writings 378 (Hunt ed.); 1 Annals of Cong. 756.

Times case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE CLARK join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York "Right of Privacy" statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiffs could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the appellee is entitled to a new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial. The instructions in this case are acceptable even within the principles today announced by the Court.

I fully agree with the views of my Brethren who have stressed the need for a generous construction of the First Amendment. I, too, believe that freedom of the press, of

speech, assembly, and religion, and the freedom to petition are of the essence of our liberty and fundamental to our values. See, *e. g.*, *Brown* v. *Louisiana*, 383 U. S. 131 (1966). I agree with the statement of my Brother BRENNAN, speaking for the Court in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963), that "These freedoms are delicate and vulnerable, as well as supremely precious in our society." But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights—how remote from public purpose, how reckless, irresponsible, and untrue it may be. I do not believe that the First Amendment precludes effective protection of the right of privacy—or, for that matter, an effective law of libel. I do not believe that we must or should, in deference to those whose views are absolute as to the scope of the First Amendment, be ingenious to strike down all state action, however circumspect, which penalizes the use of words as instruments of aggression and personal assault. There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as the right "to be let alone."[1] In 1890, Warren and Brandeis published their famous article "The Right to Privacy," in which they eloquently argued that the "excesses" of the press in "overstepping in every direction the obvious bounds of propriety and of decency" made it essential that the law recognize a right to privacy, distinct from traditional remedies for defamation, to protect private individuals against the unjustifiable infliction of mental pain and

[1] Cooley, Law of Torts 29 (2d ed. 1888).

distress.[2] A distinct right of privacy is now recognized, either as a "common-law" right or by statute, in at least 35 States.[3] Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928), the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

This Court has repeatedly recognized this principle. As early as 1886, in *Boyd* v. *United States,* 116 U. S. 616, 630, this Court held that the doctrines of the Fourth and Fifth Amendments "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."

In 1949, the Court, in *Wolf* v. *Colorado,* 338 U. S. 25, 28–29, described the immunity from unreasonable search and seizure in terms of "the right of privacy."[4]

Then, in the landmark case of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), this Court referred to "the right to privacy," "no less important than any other right carefully and particularly reserved to the people," as "basic to a free society." *Id.,* at 656. MR. JUSTICE CLARK, speaking for the Court, referred to "the freedom from

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[2] 4 Harv. L. Rev. 193, 196 (1890). See Prosser, Law of Torts 829 *et seq.* (3d ed. 1964).

[3] Prosser, *op. cit. supra,* 831, 832.

[4] *Wolf* held that the basic values of the Fourth Amendment apply to the States via the Fourteenth, but declined to require the States to exclude illegally seized evidence in criminal trials. In this latter respect it was overruled by *Mapp* v. *Ohio, infra.*

unconscionable invasions of privacy" as intimately related to the freedom from convictions based upon coerced confessions. He said that both served the cause of perpetuating "principles of humanity and civil liberty [secured] . . . only after years of struggle." *Id.*, at 657, quoting from *Bram* v. *United States*, 168 U. S. 532, 544 (1897). He said that they express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Ibid.*, quoting from *Feldman* v. *United States*, 322 U. S. 487, 489–490 (1944).

In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the Court held unconstitutional a state law under which petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The holding was squarely based upon the right of privacy which the Court derived by implication from the specific guarantees of the Bill of Rights. Citing a number of prior cases, the Court (per DOUGLAS, J.) held that "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*, at 485. As stated in the concurring opinion of Mr. Justice Goldberg, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN joined: "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" *Id.*, at 494.[5]

[5] Last Term, in *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966), MR. JUSTICE STEWART, concurring, referred to the "right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt" as reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." He referred to the "protection of private personality, like the protection of life itself," as entitled to "recognition by this Court as a basic of our constitutional system." See also MR. JUSTICE DOUGLAS, dissenting, in *Poe* v. *Ullman*, 367 U. S. 497, 521 (1961).

Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. Cf. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), sustaining a local ordinance regulating the use of sound trucks; and *Breard* v. *Alexandria,* 341 U. S. 622 (1951), sustaining a state law restricting solicitation in private homes of magazine subscriptions. Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection.[6] Particularly where the right of privacy is invaded by words—by the press or in a book or pamphlet—the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and are entitled to at least the types of protection that this Court extended in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that while the Court gives lip service to this

[6] Cf. *Breard, supra,* at 625–626:

". . . There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose."

principle, its decision, which it claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York "Right of Privacy" statute because of the "failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." In my opinion, the jury instructions, although they were not a textbook model, satisfied this standard.

In the first place, the Court does not adequately deal with the fact that the jury returned a verdict for exemplary or punitive damages, under special instructions dealing with them, as well as for compensatory damages. As to exemplary damages, the jury was specifically instructed that these might be awarded "only" if the jury found from the evidence that the defendant "falsely connected plaintiffs with The Desperate Hours, and that this was done knowingly or through failure to make a reasonable investigation." The jury was then informed that "You do not need to find that there was any actual ill will or personal malice toward the plaintiffs *if you find a reckless or wanton disregard of the plaintiffs' rights.*" (Emphasis supplied.) The jury awarded appellee $50,000 compensatory and $25,000 punitive damages. The judgment was reversed solely on the quantum of damages, the Appellate Division sustaining the finding of liability for both compensatory and exemplary damages. The Appellate Division's conclusion was that the award of damages was excessive, and it criticized the admission of certain evidence as improperly tending to cause the jury to return inflated damages. In subsequent proceedings before the trial court on assessment of damages, a jury

was waived by stipulation of the parties, the case proceeded to reassessment of damages and the judge fixed the amount of damages at $30,000, compensatory only. Judgment thereupon was affirmed by the Court of Appeals. It is this judgment that is before us—namely, jury findings of liability based on instructions covering both exemplary and compensatory damages, and an award stated to be for compensatory damages alone.[7]

The Court refers only to that part of the instructions as to exemplary damages which speaks in terms of the "failure to make a reasonable investigation," and condemns it as permitting a verdict based solely on "negligent misstatement." I respectfully submit that the instruction cannot fairly be so read. The instruction requires the jury to find both that (1) defendant "falsely connected" plaintiffs with the play, and (2) did so knowingly or through failure to make a reasonable investigation. This is certainly a charge satisfying the Court's requirement that "a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." An error in the course of investigation might be mere negligent misstatement. Failure to make a reasonable investigation is something else. The standard of a "reasonable investigation" is certainly a minimum yardstick by which to measure the liability of publishers. It is certainly not incompatible with the full flavor of the First Amendment and disregard of this standard in the circumstances is recklessness. It might well be that what constitutes an adequate basis for a jury finding of failure to make a reasonable investigation would differ, for example, in the case of a daily newspaper as compared with a feature magazine. But here no such problem arises. The truth

[7] There is no indication in the record that the court's award was intended to set aside or otherwise nullify the jury's finding under the punitive damage restrictions.

was in a folder on the desk of the author of the story. It was deliberately disregarded by his editor. Lead time on the story was three months.[8]

In addition, however, even if appellee had to rely only upon the instructions to the jury on compensatory damages, I do not agree that we should set aside the jury verdict and reverse the New York Court of Appeals. Such drastic action—the reversal of a jury verdict by this remote Court—is justified by the Court on the ground that the standard of liability on which the jury was instructed contravenes the First Amendment. But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect. Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence. Read in this perspective, the core of the instructions here on compensatory damages—even if we disregard the fact that the jury found liability under the more exacting instructions relating to exemplary damages—was sufficient to meet the majority's test. The gravamen of the court's charge, repeated *three times* in virtually the same words, was the following:

> "It is for you to determine whether, in publishing the article, the defendant Time, Incorporated *al-*

[8] The majority seek to avoid the impact of the instruction's reference to the necessity of finding "a reckless or wanton disregard of the plaintiffs' rights" by speculating that this referred only to failure to obtain consent and not to falsity. Not only is there no basis for this speculation, but the placing of this part of the instruction—immediately after the discussion of falsity—suggests that the contrary is true.

> *tered* or *changed* the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially fiction or a *fictionalized version* for trade purposes . . . ." (Emphasis supplied.)

The jury was also instructed that "Before the plaintiffs can be entitled to a verdict . . . you must find that the statements concerning the plaintiffs in the article *constituted fiction,* as compared with news, or matters which were newsworthy." (Emphasis supplied.) With all respect, I submit that this is close enough to this Court's insistence upon "knowing or reckless falsity" as to render a reversal arbitrary and unjustified. If the defendant *altered* or *changed* the true facts so that the article as published was a *fictionalized* version, this, in my judgment, was a knowing or reckless falsity. "Alteration" or "change" denotes a positive act—not a negligent or inadvertent happening. "Fictionalization" and "fiction" to the ordinary mind mean so departing from fact and reality as to be *deliberately* divorced from the fact—not merely in detail but in general and pervasive impact.[9]

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[9] The court's charge and the New York cases emphasize this definition. The most important recent case is *Spahn* v. *Messner, Inc.,* 18 N. Y. 2d 324, 221 N. E. 2d 543 (1966). In *Spahn,* the Supreme Court of New York observed: "While untrue statements do not necessarily transform a book into the category of fiction, the *all-pervasive* distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very best, a careless disregard for the responsibility of the press and within the context of this action, an abuse of the public's limited privilege to inquire into an individual's life." 43 Misc. 2d 219, 230, 250 N. Y. S. 2d 529, 541 (1964). Affirming, the Appellate Division (per Breitel, J.) observed that the book in question had been "fictionalized, concededly, in order to make it suitable for a juvenile readership" and the publishers "made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline." 23 App. Div. 2d 216, 219, 260 N. Y. S. 2d 451, 454 (1st Dept. 1965). The Appellate Division surveyed the earlier New York cases, includ-

The English language is not so esoteric as to permit serious consequences to turn upon a supposed difference between the instructions to the jury and this Court's formulation. Nor is the First Amendment in such delicate health that it requires or permits this kind of surgery, the net effect of which is not only an individual injustice, but an encouragement to recklessness and careless readiness to ride roughshod over the interests of others.

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.

Accordingly, I would affirm.

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ing the present *Hill* case, and concluded they were all based on the "distinction between *an intentionally fictionalized treatment* and a straight factual treatment (subject to inadvertent or superficial inaccuracies) . . . ." *Id.*, at 220, 260 N. Y. S. 2d, at 454. (Emphasis supplied.)

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* C & C PLYWOOD CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 53. Argued November 15, 1966.—
Decided January 9, 1967.

Respondent, employer, was charged with an unfair labor practice for inaugurating a premium pay plan during the term of a collective bargaining agreement without prior consultation with the union representing its employees, in violation of §§ 8 (a) (5) and (1) of the National Labor Relations Act. The NLRB issued a cease-and-desist order, rejecting respondent's claim that its action was authorized by a provision of the agreement. The agreement provided for grievance machinery but not for arbitration. The Court of Appeals refused to enforce the order, reasoning that a contract provision which "arguably" allowed respondent to institute the premium pay plan divested the NLRB of jurisdiction to entertain the unfair labor practice charge. *Held:*

1. The NLRB was not without jurisdiction to adjudicate the unfair labor practice charge merely because its decision required the interpretation of a provision of the collective bargaining agreement relied on as a defense by the employer. Pp. 425–430.

2. The NLRB's conclusions that the agreement gave respondent no unilateral right to institute the premium pay plan and that the union had not forgone its statutory right to bargain about the plan, reached in the light of its experience with labor relations and the Act's clear emphasis on the protection of free collective bargaining, were not erroneous. Pp. 430–431.

351 F. 2d 224, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. On the brief were *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Lawrence M. Joseph.*

George J. Tichy argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent employer was brought before the National Labor Relations Board to answer a complaint that its inauguration of a premium pay plan during the term of a collective agreement, without prior consultation with the union representing its employees, violated the duties imposed by §§ 8 (a)(5) and (1) of the National Labor Relations Act.[1] The Board issued a cease-and-desist order, rejecting the claim that the respondent's action was authorized by the collective agreement.[2] The Court of Appeals for the Ninth Circuit refused, however, to enforce the Board's order. It reasoned that a provision in the agreement between the union and the employer, which "arguably" allowed the employer to institute the premium pay plan, divested the Board of jurisdiction to entertain the union's unfair labor practice charge. 351 F. 2d 224. We granted certiorari to consider a substantial question of federal labor law. 384 U. S. 903.

In August 1962, the Plywood, Lumber, and Saw Mill Workers Local No. 2405 was certified as the bargaining representative of the respondent's production and maintenance employees. The agreement which resulted from collective bargaining contained the following provision:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the

[1] National Labor Relations Act, as amended, §§ 8 (a)(5) and (1), 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(5) and (1).

[2] The NLRB's order directed respondent to bargain with the union upon the latter's request and similarly to rescind any payment plan which it had unilaterally instituted.

written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate . . . ."

The agreement also stipulated that wages should be "closed" during the period it was effective [3] and that neither party should be obligated to bargain collectively with respect to any matter not specifically referred to in the contract.[4] Grievance machinery was established, but no ultimate arbitration of grievances or other disputes was provided.

Less than three weeks after this agreement was signed, the respondent posted a notice that all members of the

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[3] "Article XVII

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"B. It is mutually agreed that the attached classified wage scale shall be effective upon the signing of this Working Agreement with wages closed for the term of that agreement. . . ."

[4] "Article XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

"glue spreader" crews would be paid $2.50 per hour if their crews met specified biweekly (and later weekly) production standards, although under the "classified wage scale" referred to in the above quoted Art. XVII of the agreement, the members of these crews were to be paid hourly wages ranging from $2.15 to $2.29, depending upon their function within the crew.[5] When the union learned of this premium pay plan through one of its members, it immediately asked for a conference with the respondent. During the meetings between the parties which followed this request, the employer indicated a willingness to discuss the terms of the plan, but refused to rescind it pending those discussions.

It was this refusal which prompted the union to charge the respondent with an unfair labor practice in violation of §§ 8 (a)(5) and (1). The trial examiner found that the respondent had instituted the premium pay program in good-faith reliance upon the right reserved to it in the collective agreement. He, therefore, dismissed the complaint. The Board reversed. Giving consideration to the history of negotiations between the parties,[6] as well as the express provisions of the collective

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[5] Workers in the three job classifications composing the glue spreader crews were to receive the following wages:

Core Layer	$2.29/hour
Core Feeder	$2.24/hour
Sheet Turner	$2.15/hour

[6] The trial examiner found that "quite some time prior" to the execution of the contract, the respondent's general manager had proposed an "incentive bonus system" within the department where the glue spreader crews worked. The union's representative, however, declared that the union would not agree to such a plan. Sometime later in the negotiations, the respondent again made reference to the fact that it was "giving thought" to incentive pay, but the trial examiner was unable to conclude that this reference was related to the premium pay provision that eventually appeared in the contract.

agreement, the Board ruled the union had not ceded power to the employer unilaterally to change the wage system as it had. For while the agreement specified different hourly pay for different members of the glue spreader crews and allowed for merit increases for "particular employee[s]," the employer had placed all the members of these crews on the same wage scale and had made it a function of the production output of the crew as a whole.

In refusing to enforce the Board's order, the Court of Appeals did not decide that the premium pay provision of the labor agreement had been misinterpreted by the Board. Instead, it held the Board did not have jurisdiction to find the respondent had violated § 8 (a) of the Labor Act, because the "existence . . . of an unfair labor practice [did] not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement . . . ." 351 F. 2d, at 228.

The respondent does not question the proposition that an employer may not unilaterally institute merit increases during the term of a collective agreement unless some provision of the contract authorizes him to do so. See *Labor Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6th Cir.), cert. denied, 335 U. S. 814. Cf. *Beacon Piece Dyeing Co.*, 121 N. L. R. B. 953 (1958).[7] The argument is, rather, that since the contract contained a provision which *might* have allowed the respondent to institute the wage plan in question, the Board was powerless to determine whether that provision *did* authorize

[7] For illustrations of the limited discretion which the Labor Act allows employers concerning the wages of employees represented by certified unions, see *Labor Board* v. *Katz*, 369 U. S. 736; *Labor Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217.

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the respondent's action, because the question was one for a state or federal court under § 301 of the Act.[8]

In evaluating this contention, it is important first to point out that the collective bargaining agreement contained no arbitration clause.[9] The contract did provide grievance procedures, but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not "the therapy of arbitration." *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 272. Thus, the Board's action in this case was in no way inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences." *International Harvester Co.*, 138 N. L. R. B. 923, 926 (1962), aff'd *sub nom. Ramsey* v. *Labor Board*, 327 F. 2d 784 (C. A. 7th Cir.), cert. denied, 377 U. S. 1003.[10]

The respondent's argument rests primarily upon the legislative history of the 1947 amendments to the Na-

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[8] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.

[9] The Court of Appeals in this case relied upon its previous decision in *Square D Co.* v. *Labor Board*, 332 F. 2d 360. But *Square D* involved a collective agreement that provided for arbitration. See Note, Use of an Arbitration Clause, 41 Ind. L. J. 455, 469 (1966).

[10] See also *Cloverleaf Div. of Adams Dairy Co.*, 147 N. L. R. B. 1410, 1416 (1964), where the Board made the following observation to justify, in part, its decision to construe a labor contract in the course of an unfair labor practice proceeding:

". . . it affirmatively appears that neither party has even so much as sought to invoke arbitration. Nor is this a case involving an alleged unfair labor practice, the existence of which turns primarily on an interpretation of specific contractual provisions, unquestionably encompassed by the contract's arbitration provisions, and coming to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." (Footnotes omitted.)

Cf. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955).

tional Labor Relations Act. It is said that the rejection by Congress of a bill which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements shows that the Board is without power to decide any case involving the interpretation of a labor contract. We do not draw that inference from this legislative history.

When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements [11] and that such matters should be placed within the jurisdiction of the courts,[12] it was acting upon a principle which this Court had already recognized:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them."

Terminal Railroad Assn. v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6. To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view

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[11] An earlier version of the Senate bill contained the following provision:

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . .

"(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration . . . ." Section 8 (b)(5) of the same bill imposed a similar limitation upon labor organizations. S. 1126, 80th Cong., 1st Sess., 1 Legis. History of LMRA 109–111, 114. Neither of these provisions was in the bill enacted into law.

[12] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.

Congress' decision not to give the Board that broad power as a refusal to take this step.[13]

But in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.

This conclusion is reinforced by previous judicial recognition that a contractual defense does not divest the Labor Board of jurisdiction. For example, in *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, the legality of an employer's refusal to reinstate strikers was based upon the Board's construction of a "no strike" clause in the labor agreement, which the employer contended allowed it to refuse to take back workers who had walked out in protest over its unfair labor practice. The strikers applied to the Board for reinstatement and back

[13] Congress was also concerned with the possibility of conflicting decisions that would result from placing all questions of contract interpretation before both the Board and the courts. See 93 Cong. Rec. 4033, 2 Legis. History of LMRA 1043 (remarks of Senator Murray); 93 Cong. Rec. 6443, 2 Legis. History of LMRA 1539. But such a possibility does not arise in a case like the present one, since courts have no jurisdiction to enforce the union's statutory rights under §§ 8 (a)(5) and (1).

pay. In giving the requested relief, the Board was forced to construe the scope of the "no strike" clause. This Court, in affirming, stressed that the whole case turned "upon the proper interpretation of the particular contract . . . ." 350 U. S., at 279. Thus, *Mastro Plastics* stands squarely against the respondent's theory as to the Board's lack of power in the present case.[14]

If the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights. Where, as here, the parties have not provided for arbitration, the union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement.[15] If it succeeded in court, the union would then

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[14] In *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, the employer was charged with a violation of §§ 8 (a) (1), (2) and (3), and not with a failure to bargain. But nothing is suggested that would justify distinguishing the case on that ground.

[15] The precise nature of the union's case in court is not readily apparent. If damages for breach of contract were sought, the union would have difficulty in establishing the amount of injury caused by respondent's action. For the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents. If an injunction were sought to vindicate the union's contractual rights, the problem of the applicability of the Norris-LaGuardia Act would have to be faced. A federal injunction issuing from a court with § 301 jurisdiction might be barred by § 7 of that Act. See *International Union of Electrical Workers* v. *General Electric Co.*, 341 F. 2d 571 (C. A. 2d Cir.); *Local No. 861* v. *Stone & Webster Corp.*, 163 F. Supp. 894 (D. C. W. D. La.). Cf. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195; *Publishers' Assn.* v. *New York Mailers' Union*, 317 F. 2d 624 (C. A. 2d Cir.), cert. granted, 375 U. S. 901, judgment vacated in part for dismissal as moot, 376 U. S. 775. Whether a state injunction might be similarly barred in suits governed by federal labor law, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, is an

have to go back to the Labor Board to begin an unfair labor practice proceeding. It is not unlikely that this would add years to the already lengthy period required to gain relief from the Board.[16] Congress cannot have intended to place such obstacles in the way of the Board's effective enforcement of statutory duties. For in the labor field, as in few others, time is crucially important in obtaining relief. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 526 (dissenting opinion).

The legislative history of the Labor Act, the precedents interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case. We hold that the Court of Appeals was in error in deciding to the contrary.

The remaining question, not reached by the Court of Appeals, is whether the Board was wrong in concluding that the contested provision in the collective agreement gave the respondent no unilateral right to institute its premium pay plan. In reaching this conclusion, the Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context. See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Nor can we say that the Board was

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open question. See *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 514, n. 8. Thus, it may be that the only remedy in court which would be available to the union would be a suit for a declaratory judgment, assuming such a suit in these circumstances would be maintainable under state or federal law.

[16] The instant charge, for example, was filed July 31, 1963.

wrong in holding that the union had not forgone its statutory right to bargain about the pay plan inaugurated by the respondent. For the disputed contract provision referred to increases for "particular employee[s]," not groups of workers. And there was nothing in it to suggest that the carefully worked out wage differentials for various members of the glue spreader crew could be invalidated by the respondent's decision to pay all members of the crew the same wage.[17]

The judgment is accordingly reversed and the case is remanded to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

[17] The respondent points to two other labor contracts in its area to support its version of the provision here in question, but those agreements, even if relevant, fall short of substantiating its position. In one, a premium was paid to members of two-man crews who accomplished prescribed production goals. But the respondent does not show that this premium leveled a wage differential set up by the collective bargaining agreement. In the other, a lumber company's head sawyer received an hourly bonus if the plant exceeded a certain monthly output.

NATIONAL LABOR RELATIONS BOARD *v.* ACME INDUSTRIAL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 52. Argued November 14, 1966.—Decided January 9, 1967.

A collective bargaining agreement, which contained procedures for processing grievances culminating in compulsory and binding arbitration, provided that it was the respondent, employer's, policy not to "subcontract work which is normally performed by employees in the bargaining unit," and that, except as provided therein, if "equipment of the plant . . . is hereafter moved to another location of the Company, employees . . . who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority . . . ." During the contract term certain machinery was removed from the plant and in response to the union's query respondent stated that there was no violation of the agreement and therefore no obligation to answer questions about the machines. The union filed grievances and requested information concerning the equipment, which was refused by respondent. Unfair labor practice charges were then filed with the NLRB which held that respondent violated § 8 (a) (5) of the National Labor Relations Act by refusing to bargain in good faith. The NLRB issued a cease-and-desist order after finding that the information was necessary to enable the union to evaluate the grievances filed and noting that the agreement contained no waiver of the union's statutory right to such information. The Court of Appeals refused to enforce the NLRB's order, holding that the provision for binding arbitration foreclosed the NLRB's exercise of power, as the construction and application of the contract provisions are solely for the arbitrator. *Held:* The arbitration provision in the agreement did not preclude the NLRB from finding that respondent violated § 8 (a) (5) by refusing to furnish the union with information necessary to the proper performance of its representative duties. Pp. 435–439.

(a) The employer has a general obligation to provide information needed by the bargaining representative for the proper performance of its duties during the term of a collective bargaining agreement. Pp. 435–436.

(b) The NLRB did not make a binding construction of the contract but only acted on the probability that the desired information was relevant and useful to the union in carrying out its statutory duties and responsibilities. P. 437.

(c) The NLRB's action was in aid of the arbitral process by helping to sift out unmeritorious claims. P. 438.

351 F. 2d 258, reversed and remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Nancy M. Sherman.*

E. Allan Kovar argued the cause and filed a brief for respondent.

Joseph L. Rauh, Jr., John Silard, Stephen I. Schlossberg and *Harriett R. Taylor* filed a brief for Amalgamated Local Union No. 310, UAW, AFL–CIO, intervenor.

MR. JUSTICE STEWART delivered the opinion of the Court.

In *NLRB* v. *C & C Plywood Corp., ante,* p. 421, decided today, we dealt with one aspect of an employer's duty to bargain during the term of a collective bargaining agreement. In this case we deal with another—involving the obligation to furnish information that allows a union to decide whether to process a grievance.

In April 1963, at the conclusion of a strike, the respondent entered into a collective bargaining agreement with the union which was the certified representative of its employees. The agreement contained two sections relevant to this case. Article I, § 3, provided, "It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work . . . ." In Art. VI, § 10, the respondent agreed that "[i]n the event the equipment of the

plant . . . is hereafter moved to another location of the Company, employees working in the plant . . . who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering . . . employees at such location." A grievance procedure culminating in compulsory and binding arbitration was also incorporated into the collective agreement.

The present controversy began in January 1964, when the union discovered that certain machinery was being removed from the respondent's plant. When asked by union representatives about this movement, the respondent's foremen replied that there had been no violation of the collective agreement and that the company, therefore, was not obliged to answer any questions regarding the machinery. After this rebuff, the union filed 11 grievances charging the respondent with violations of the above quoted clauses of the collective agreement. The president of the union then wrote a letter to the respondent, requesting "the following information at the earliest possible date:

> "1. The approximate dates when each piece of equipment was moved out of the plant.
>
> "2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
>
> "3. The number of machines or equipment that was moved out of the plant.
>
> "4. What was the reason or purpose of moving the equipment out of the plant.
>
> "5. Is this equipment used for production elsewhere."

The company replied by letter that it had no duty to furnish this information since no layoffs or reductions in

job classification had occurred within five days (the time limitation set by the contract for filing grievances) prior to the union's formal request for information.

This refusal prompted the union to file unfair labor practice charges with the National Labor Relations Board. A complaint was issued, and the Board, overruling its trial examiner, held the respondent had violated § 8 (a)(5) of the Act [1] by refusing to bargain in good faith. Accordingly, it issued a cease-and-desist order. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed" and pointed out that the agreement contained no "clause by which the Union waives its statutory right to such information."

The Court of Appeals for the Seventh Circuit refused to enforce the Board's order. 351 F. 2d 258. It did not question the relevance of the information nor the finding that the union had not expressly waived its right to the information. The court ruled, however, that the existence of a provision for binding arbitration of differences concerning the meaning and application of the agreement foreclosed the Board from exercising its statutory power. The court cited *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, and *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, as articulating a national labor policy favoring arbitration and requiring the Board's deference to an arbitrator when construction and application of a labor agreement are in issue. We granted certiorari to consider the substantial question of federal labor law thus presented. 383 U. S. 905.

There can be no question of the general obligation of an employer to provide information that is needed by

[1] National Labor Relations Act, as amended, 61 Stat. 141, 29 U. S. C. § 158 (a)(5).

the bargaining representative for the proper performance of its duties. *Labor Board* v. *Truitt Mfg. Co.*, 351 U. S. 149. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. *NLRB* v. *C & C Plywood Corp.*, *ante*, p. 421; *Labor Board* v. *F. W. Woolworth Co.*, 352 U. S. 938. The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under § 8 (a)(5).

The two cases upon which the court below relied, and the third of the *Steelworkers* trilogy, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, do not throw much light on the problem. For those cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. 363 U. S., at 567, 581–582, 596–597. The relationship of the Board to the arbitration process is of a quite different order. See *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 269–272. Moreover, in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under § 301,[2] must be considered. Section 8 (a)(5) proscribes failure to bargain collectively in only the most general terms, but § 8 (d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising

[2] Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.

[under an agreement] . . . ." [3] And § 10 (a)[4] provides: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Thus, to view the *Steelworkers* decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator [5] is to overlook important distinctions between those cases and this one.

But even if the policy of the *Steelworkers Cases* were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here. For when it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decided nothing about the merits of the union's contractual claims.[6] When the respondent furnishes the requested

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[3] Cf. *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 581: "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

[4] 61 Stat. 146, 29 U. S. C. § 160 (a).

[5] See *Sinclair Refining Co.* v. *N. L. R. B.*, 306 F. 2d 569, 570 (C. A. 5th Cir.).

[6] Cf. 4 Moore, Federal Practice ¶ 26.16[1], 1175–1176 (2d ed.): "[I]t must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." *Id.*, at 1181:

"Examination as to relevant matters should be allowed whether or not the theory of the complaint is sound or the facts, if proved, would support the relief sought."

information, it may appear that no subcontracting or work transfer has occurred, and, accordingly, that the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the respondent's contention that no breach of the agreement occurred because no employees were laid off or reduced in grade within five days prior to the filing of any grievance. Such conclusions would clearly not be precluded by the Board's threshold determination concerning the potential relevance of the requested information. Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.[7]

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.[8] The expense of arbitration might be placed upon the union only for it to learn

[7] This case, therefore, differs from *NLRB* v. *C & C Plywood Corp.*, *ante*, p. 421, where the Board's determination that the employer did not have a contractual right to institute a premium pay plan was a determination on the merits. See *C & C Plywood*, *ante*, at 426, and n. 10.

[8] See *Fafnir Bearing Co.* v. *N. L. R. B.*, 362 F. 2d 716, 721:

"By preventing the Union from conducting these studies [for an intelligent appraisal of its right to grieve], the Company was, in essence, requiring it to play a game of blind man's bluff."

that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.

We hold that the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

SWANN ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 136. Argued December 6, 1966.—Decided January 9, 1967.

Following this Court's decisions in *Swann* v. *Adams*, invalidating the apportionment of the Florida Legislature (378 U. S. 553) and the subsequent reapportionment which the District Court had found unconstitutional but approved on an interim basis (383 U. S. 210), the Florida Legislature adopted still another legislative reapportionment plan, which appellants, residents and voters of Dade County, Florida, attacked as failing to meet the standards of voter equality set forth in *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases. The new plan provides for 48 senators and 117 representatives. The senate districts range from 15.09% overrepresentation to 10.56% underrepresentation, the ratio between the largest and smallest district being 1.30 to 1. The house districts range from 18.28% overrepresentation to 15.27% underrepresentation, the ratio between the largest and the smallest district being 1.41 to 1. The State failed to present any acceptable reasons for the population variance between districts, indicating only that it was attempting to follow congressional district lines and that its plan came as close as "practical" to complete population equality, though appellants' proposed plan showed the feasibility of measurably reducing population differences between districts. Though recognizing that "apportionment must be substantially on a population basis," the District Court held the variations not discriminatory and upheld the plan. *Held:*

1. Appellants have standing to attack the reapportionment. P. 443.

2. The State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. Pp. 443–447.

(a) Allowable deviations from equality of population between legislative districts are confined to minor variations which "are based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds* v. *Sims*, *supra*, at 579. P. 444.

(b) Minor variations from a pure population standard must be nondiscriminatory and justified by state policy considerations such as integrity of political subdivisions, maintenance of compactness and contiguity in legislative districts, or recognition of natural or historical boundary lines. P. 444.

(c) Variation from the norm approved in one State has little relevance to the validity of a similar variation in another State. P. 445.

258 F. Supp. 819, reversed.

D. P. S. Paul argued the cause for appellants. With him on the briefs were *P. D. Thomson, Neal Rutledge, Richard F. Wolfson, Thomas C. Britton* and *Stuart Simon.*

Earl Faircloth, Attorney General of Florida, argued the cause for appellees. With him on the brief for appellees Adams et al. were *Edward D. Cowart, W. E. Bishop, Jr.,* and *Robert A. Chastain,* Assistant Attorneys General. On the brief for appellee Freeman were *Leo L. Foster* and *John A. Madigan, Jr.*

David Popper, Stewart D. Allen and *John M. Dyer* filed a brief for Davis et al., as *amici curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents still another development in the efforts of the State of Florida to apportion its legislature in accordance with the requirements of the Federal Constitution. There have been previous chapters in this story. The litigation began in 1962. On June 22, 1964, in *Swann* v. *Adams,* 378 U. S. 553, we reversed the judgment of the three-judge District Court upholding the then-current legislative apportionment in Florida and remanded the case for further proceedings, consistent with the Court's opinion in *Reynolds* v. *Sims,* 377 U. S. 533, and its companion cases. The District Court then deferred further action until the conclusion of the legislative session which convened on April 6, 1965. The

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legislature proceeded to reapportion the State on June 29, 1965. The District Court forthwith held the new plan failed to meet the requirements of the Fourteenth Amendment but approved the plan on an interim basis, limiting it to the period ending 60 days after the adjournment of the 1967 session of the Florida Legislature. This Court, finding no warrant for perpetuating what all conceded was an unconstitutional apportionment for another three years, reversed the judgment and remanded the case to the District Court so that a valid reapportionment plan would be made effective for the 1966 elections. *Swann* v. *Adams*, 383 U. S. 210. The Florida Legislature again acted on the matter in March 1966 by adopting still another reapportionment plan which the appellants promptly attacked in the District Court.

The new plan provides for 48 senators and 117 representatives, and includes what in effect are multimember districts for each house. The senate districts range from 87,595 to 114,053 in population per senator, or from 15.09% overrepresented to 10.56% underrepresented. The ratio between the largest and the smallest district is thus 1.30 to 1. The deviation from the average population per senator is greater than 15% in one senatorial district, is greater than 14% in five more districts and is more than 10% in still six other districts. Approximately 25% of the State's population living in one quarter of the total number of senatorial districts is underrepresented or overrepresented by at least 10%. The minimum percentage of persons that could elect a majority of 25 senators is 48.38%.

In the house the population per representative ranges from 34,584 to 48,785 or from 18.28% overrepresented to 15.27% underrepresented. The ratio between the largest and the smallest representative district is 1.41 to 1. Two districts vary from the norm by more than 18%

and another by more than 15%, these three districts having seven of the 117 representatives. Ten other districts with 22 representatives vary from the norm by more than 10%. There is thus a deviation of more than 10% in districts which elect 29 of the 117 representatives; 24.35% of the State's population lives in these districts. The minimum percentage of persons that could elect a majority of 59 representatives is 47.79%.

The District Court recognized that "apportionment must be substantially on a population basis" but that "[m]athematical exactness or precision is not required." It went on to hold "[s]uch departures as there are from the ideal are not sufficient in number or great enough in percentages to require an upsetting of the legislative plan. . . . [W]hat deviation there is does not discriminate to any great extent against any section of the state or against either rural or urban interests." 258 F. Supp. 819, 826, 827. Accordingly, the plan was held constitutional.

The State would have us dismiss this case for lack of standing on the part of appellants to maintain this appeal because appellants are from Dade County, Florida, which appellants concede has received constitutional treatment under the legislative plan. Appellants, however, had before the District Court their own plan which would have accorded different treatment to Dade County in some respects as compared with the legislative plan, and the alternative plan was rejected by the District Court. Moreover, the District Court has apparently consistently denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State. The challenge to standing cannot succeed.

We reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various

legislative districts with respect to both the senate and house of representatives. *Reynolds* v. *Sims, supra,* recognized that mathematical exactness is not required in state apportionment plans. *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. On the contrary, the *Reynolds* opinion limited the allowable deviations to those minor variations which "are based on legitimate considerations incident to the effectuation of a rational state policy." 377 U. S. 533, 579. Thus that opinion went on to indicate that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines. Likewise, in *Roman* v. *Sincock,* 377 U. S. 695, 710, the Court stated that the Constitution permits "such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

The State relies on *Forty-fourth General Assembly of Colorado* v. *Lucas,* 379 U. S. 693; *Burnette* v. *Davis,* 382 U. S. 42; and *Harrison* v. *Schaefer,* 383 U. S. 269, which were *per curiam* affirmances of lower court judgments in reapportionment cases. The State suggests that the plans approved in those cases involved variations in magnitude equal to or greater than those revealed by the Florida apportionment, and for that reason the judgment here should be affirmed. But in none of these cases was the issue of the validity of the differences in population between various legislative districts either raised or ruled upon in this Court. There was no occasion to explore whether or not there was ample justification for the

challenged variations. And in *Lucas* v. *Forty-fourth General Assembly of Colorado*, 377 U. S. 713, 727, 734–735, the Court expressly reserved decision upon the validity of a variance ratio of 1.7 to 1. In any event, the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. "What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case." *Reynolds* v. *Sims*, 377 U. S. 533, 578.

As this case comes to us we have no alternative but to reverse. The District Court made no attempt to explain or justify the many variations among the legislative districts. As for the State, all it suggested in either the lower court or here is that its plan comes as close as "practical" to complete population equality and that the State was attempting to follow congressional district lines. There was, however, no attempt to justify any particular deviations, even the larger ones, with respect to either of these considerations. Moreover, the State's brief states only that the legislature followed "in most instances" the congressional boundaries, and with respect to "practicality" it seems quite obvious that the State could have come much closer to providing districts of equal population than it did. The appellants themselves placed before the court their own plan which revealed much smaller variations between the districts than did the plan approved by the District Court. Furthermore, appellants suggested to the District Court specific amendments to the legislative plan which, if they had been accepted, would have measurably reduced the population differences between many of the districts. Appellants' own plan and their suggested amendments to the legislative plan might have been infirm in other respects but they do demonstrate that a closer approximation to equally populated districts was a feasible

undertaking. The State, with admirable candor, states that it offered no evidence in the District Court to explain the challenged variations with respect to either the house or the senate. In its view, however, the plan should be approved on the record as it is.

We think the better view is that taken by the three-judge court in Maryland which disapproved a legislative plan involving an overrepresentation of 14.90% and an underrepresentation of 14.38% because, as Judge Sobeloff said, there was "no showing in this case that the difference of one-third is unavoidable or justified upon any legally acceptable ground." *Maryland Citizens Committee for Fair Congressional Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731, 733. Compare *League of Nebraska Municipalities* v. *Marsh*, 242 F. Supp. 357, disapproving a ratio of 1.6 to 1 between the smallest and the largest district absent satisfactory explanation by the State, and *Paulson* v. *Meier*, 246 F. Supp. 36, which found a ratio between the smallest and largest district of 1.39 to 1 to be unjustified on the basis offered by the State.

The appellants complain of other aspects of the plan besides unequally populated legislative districts. Under the new statute three senators were not required to run for election in 1966 but were allowed to finish their present terms expiring in 1968. These three senators, as the District Court noted, were elected in districts that are identical in territory to their districts under the legislative plan. Also, one senate and six house seats were subject to residency requirements. The District Court found no invidious discrimination in these aspects of the plan. Appellants also claim that the legislative plan discriminates invidiously by underrepresenting the populous urban counties and by overrepresenting the sparsely settled rural counties in both houses. The court below found that "what deviation there is does not

discriminate to any great extent against any section of the state or against either rural or urban interests." 258 F. Supp. 819, 827. In the light of our disposition of this case, however, we need not reach and decide any of these additional issues, although we note that *Reynolds* v. *Sims* indicates the constitutional impropriety of maintaining deviations from the equal population principle in deference to area and economic or other group interests. 377 U. S. 533, 579–580.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Reynolds v. *Sims*, 377 U. S. 533, laid down a "one man, one vote" mandate for the structuring of all state legislatures, but the Court there recognized, as it does again today, that "mathematical exactness . . . is not required," *ante*, at 443, and that variations are acceptable if they "are based on legitimate considerations incident to the effectuation of a rational state policy . . . ." 377 U. S., at 579, cited, *ante*, at 444. The Court refuses, however, to accept Florida's present legislative apportionment plan, at least on the record before us, because neither the State nor the District Court justified the relatively minor variations in population among some of the districts.

This holding seems to me to stand on its head the usual rule governing this Court's approach to the validity of legislative enactments, state as well as federal, which is, of course, that they come to us with a strong presumption of regularity and constitutionality. See, *e. g.*, *Butler* v. *Pennsylvania*, 10 How. 402; *Davis* v. *Department of Labor*, 317 U. S. 249; *Flemming* v. *Nestor*, 363 U. S. 603. Accordingly, I do not believe the burden is on the State to justify every aspect of a complex plan completely restructuring its legislature, on pain of its

being declared constitutionally invalid by the judiciary. I can think of no other area of law in which there is an analogous presumption of invalidity attaching to a legislative enactment of a State in an area of its admitted competence and superior experience. The burden of showing unconstitutionality should be left here, as in other cases, on the attacking party.

I would affirm the judgment of the District Court on the grounds (1) that the plan enacted by the Florida Legislature is in substantial compliance with the rule of *Reynolds* v. *Sims, supra,* and (2) that the appellants have not shown any invidious purpose for, or effect flowing from, the mathematical variations among certain districts.

IN RE MEEKER.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 704. Decided January 9, 1967.

76 N. M. 354, 414 P. 2d 862, appeal dismissed and certiorari denied.

Appellant *pro se.*

Ross L. Malone for the Board of Bar Commissioners of the New Mexico State Bar, appellee.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

GARCIA ET AL. *v.* MORALES.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 735. Decided January 9, 1967.

47 N. J. 269, 220 A. 2d 198, appeal dismissed.

Edward B. Meredith for appellants.

Arthur J. Sills, Attorney General of New Jersey, *Alan B. Handler,* First Assistant Attorney General, and *Richard Newman,* Deputy Attorney General, for intervenor-appellee, State of New Jersey, Unsatisfied Claim and Judgment Fund.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. *v.* PREISLER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 738. Decided January 9, 1967.

257 F. Supp. 953, affirmed.

Norman H. Anderson, Attorney General of Missouri, and *J. Gordon Siddens* and *Thomas J. Downey*, Assistant Attorneys General, for appellants.

Paul W. Preisler, pro se, and for other appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

NAVE *v.* CITY OF SEATTLE.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 767. Decided January 9, 1967.

68 Wash. 2d 72, 415 P. 2d 93, appeal dismissed.

Appellant *pro se*.

A. L. Newbould for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GLOUNER ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 756. Decided January 9, 1967.

Appeal dismissed.

Hyman Goldman for appellants.

R. B. Pegram, W. H. Peterson and *Jack M. Miller* for the State of California, real party in interest.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BOGART *v.* TRAYNOR, CHIEF JUSTICE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 767, Misc. Decided January 9, 1967.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Warren M. Christopher for appellee State Bar of California.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied. The request for other relief is also denied.

WEBSTER *v.* LEE COUNTY DISTRICT COURT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 31, Misc. Decided January 9, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Lawrence F. Scalise, Attorney General of Iowa, and *Don R. Bennett,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The judgment is vacated and the case is remanded to the Supreme Court of Iowa for further consideration in light of *Long* v. *District Court of Iowa in and for Lee County, ante,* p. 192.

HUNTER *v.* NEW YORK.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 917, Misc. Decided January 9, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ROOSEVELT RACEWAY, INC. *v.* COUNTY OF NASSAU ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 732. Decided January 9, 1967.

18 N. Y. 2d 30, 218 N. E. 2d 539, appeal dismissed.

George Morton Levy for appellant.

Morris H. Schneider for the County of Nassau et al.; *Louis J. Lefkowitz*, Attorney General of New York, *pro se*, and *Daniel M. Cohen*, Assistant Attorney General, for the Attorney General of New York, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.

NEHRING *v.* CITY OF DeKALB ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 758. Decided January 9, 1967.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

FEDERATED DEPARTMENT STORES, INC. *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 171. Decided January 9, 1967.

16 N. Y. 2d 320, 213 N. E. 2d 677; 17 N. Y. 2d 579, 215 N. E. 2d 516, appeal dismissed.

Wilbur H. Friedman and *George G. Gallantz* for appellant.

J. Lee Rankin for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

DUDDLESTON ET AL. *v.* GRILLS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 370. Decided January 9, 1967.

255 F. Supp. 155, vacated and remanded.

Benjamin G. Cox and *Buena Chaney* for appellants.

John J. Dillon, Attorney General of Indiana, for appellees Branigin et al.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court for further consideration in light of *Swann* v. *Adams, ante,* p. 440, *Wesberry* v. *Sanders,* 376 U. S. 1, and *Reynolds* v. *Sims,* 377 U. S. 533.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that the judgment should be affirmed.

DROSTE *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 671. Decided January 9, 1967.

34 Ill. 2d 495, 217 N. E. 2d 73, appeal dismissed and certiorari denied.

Calvin P. Sawyier for appellant.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for appellees Kerner et al. *Henry L. Pitts* for appellee United States Steel Corp.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ILLINOIS CENTRAL RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 687. Decided January 9, 1967.*

263 F. Supp. 421, affirmed.

Hugh B. Cox, William H. Allen, Robert Mitten and *William J. O'Brien, Jr.*, for appellant in No. 687. *Nuel D. Belnap, Richard M. Freeman* and *Daniel J. Sweeney* for appellant in No. 688. *John B. Goodrich* for appellant in No. 689.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.; *James W. Hoeland, W. L. Grubbs* and *Joseph L. Lenihan* for Louisville & Nashville Railroad Co.; *W. McNeil Kennedy* for Chicago & Eastern Illinois Railroad Co.; *Albert E. Jenner, Jr., Samuel W. Block, Thomas P. Sullivan* and *John C. Tucker* for Missouri Pacific Railroad Co., and *Leon Leighton, pro se*, appellees in all cases.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

*Together with No. 688, *St. Louis Southwestern Railway Co.* v. *United States et al.*, and No. 689, *Monon Railroad* v. *United States et al.*, also on appeal from the same court.

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LASSEN, COMMISSIONER, STATE LAND DEPARTMENT *v.* ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 84. Argued November 16, 1966.—Decided January 10, 1967.

The State of Arizona on relation of its Highway Department sued in the Arizona Supreme Court to prohibit the State Land Commissioner (who is essentially the trustee of lands granted to the State for specified public purposes by the United States pursuant to the New Mexico-Arizona Enabling Act) from enforcing rules governing the acquisition of rights of way and material sites in the trust lands. The rules provided that rights of way and material sites could be granted for an indefinite period after full payment of the appraised value. The Enabling Act, by such provisions as those for public notice and public sale, restricts the manner of disposition of trust lands and provides that no lands may be sold for less than their appraised value. The Act does not directly refer to the use by the State itself of trust lands for purposes not designated in the grant. The State Supreme Court ordered the Commissioner to grant the material sites and rights of way without compensation, holding that it may be conclusively presumed that highways across trust lands always enhance the value of remaining trust lands in amounts at least equal to the value of the areas taken. *Held:*

1. Consistent with the essential purposes of the Enabling Act, the restrictions on the manner of disposition of trust lands are not applicable to acquisitions by the State for its highway program. Pp. 461–465.

2. The State must compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands, not diminished by the amount of any enhancement in value of the remaining trust lands. Pp. 465–470.

99 Ariz. 161, 407 P. 2d 747, reversed and remanded.

John P. Frank argued the cause for petitioner. With him on the briefs were *Darrell F. Smith,* Attorney General of Arizona, by *Dale R. Shumway* and *Dix W. Price.*

Rex E. Lee argued the cause for respondent. With him on the brief were *Darrell F. Smith,* Attorney General of Arizona, by *John T. Amey,* Assistant Attorney General, and *J. A. Riggins, Jr.*

Assistant Attorney General Weisl, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Marshall* and *Richard A. Posner.*

John J. O'Connell, Attorney General, and *Harold T. Hartinger,* Assistant Attorney General, filed a brief for the State of Washington, as *amicus curiae,* urging reversal.

John J. O'Connell, Attorney General of Washington, and *John R. Miller,* Assistant Attorney General, filed a brief for the Washington Parks and Recreation Commission, as *amicus curiae,* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This action was brought as an original proceeding in the Supreme Court of Arizona by the State on the relation of its Highway Department. The Department seeks to prohibit the application by the State Land Commissioner of rules governing the acquisition of rights of way and material sites in federally donated lands held in trust by the State.[1] The Commissioner's rules provide in pertinent part that "Rights of Way and Material Sites may be

[1] This action is in form and substance a controversy between two agencies of the State of Arizona, both formally represented by the State's Attorney General. We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause. He is essentially the trustee of the trust at issue here, with custody of the trust lands. In addition, both the Commissioner and the Highway Department are represented by special counsel appointed by the Attorney General to advocate the divergent positions of the parties.

granted . . . for an indefinite period . . . after full payment of the appraised value . . . has been made to the State Land Department. The appraised value . . . shall be determined in accordance with the principles established in A. R. S. 12–1122." Rule 12. The Supreme Court of Arizona held that it may be conclusively presumed that highways constructed across trust lands always enhance the value of the remaining trust lands in amounts at least equal to the value of the areas taken. It therefore ordered the Commissioner to grant without actual compensation material sites and rights of way upon trust lands. 99 Ariz. 161, 407 P. 2d 747.

The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State.[2] The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union.[3] Although the terms of these grants differ, at least the most recent commonly make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United

[2] The grants consisted of four sections in each township for the support of common schools, plus specified acreages for other designated purposes. The other acreages were granted for the support of agricultural and mechanical colleges, a school of mines, military institutes, the payment of bonds, miners' hospitals, penitentiaries, and similar purposes. Of the 10,790,000 acres granted to Arizona for all designated uses, some 9,180,000 acres were earmarked for various educational purposes, of which some 8,000,000 acres were given for the support of common schools.

[3] Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools. The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963).

States to maintain whatever proceedings may be necessary to enforce its terms.[4] We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands.[5] 384 U. S. 926.

The issues here stem chiefly from ambiguities in the grant itself. The terms under which the United States provided these lands were included in the New Mexico-Arizona Enabling Act. 36 Stat. 557. The Act describes with particularity the disposition Arizona may make of the lands and of the funds derived from them, but it does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant. Of the issues which may arise from the Act's silence, we need now reach only two: first, whether Arizona is permitted to obtain trust lands for such uses without first satisfying the Act's restrictions on disposition of the land; and second, what standard of compensation Arizona must employ to recompense the trust for the land it uses. Both issues require consideration of the Act's language and history.

I.

We turn first to the question of the method by which Arizona may obtain trust lands for purposes not included in the grant. The constraints imposed by the Act upon the methods by which trust lands may be transferred are few and simple. Section 28, which is reproduced in the Appendix to this opinion, requires, with exceptions inapplicable here, that lands be sold or

[4] 36 Stat. 575.

[5] Nine States urged as *amici curiae* that we review the judgment below. One of the nine, New Mexico, received lands in trust under the very grant in issue here. The Supreme Court of New Mexico has held in closely similar circumstances that actual compensation must be paid to the trust. *State* v. *Walker*, 61 N. M. 374, 301 P. 2d 317.

leased only to "the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands . . . shall lie . . . ." The section prescribes the terms, form and frequency of the notice which must be given of the auction. It requires that no lands be sold for a price less than their appraised value. The Act imposes two sanctions upon transactions which fail to satisfy its requirements. First, § 28 provides broadly that trust lands must be "disposed of in whole or in part only in manner as herein provided . . . ." It adds that "Disposition of any of said lands . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust." Finally, it provides that "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed . . . not made in substantial conformity with the provisions of this Act shall be null and void . . . ."

The parties urge, and the state court assumed, that Arizona need not follow these procedures when it seeks material sites and rights of way upon trust lands.[6] The Commissioner's rules thus do not require an auction or other public sale. This view has been taken by other state courts construing similar grants. *Ross* v. *Trustees of University of Wyoming*, 30 Wyo. 433; 222 P. 3, *State* v. *Walker*, 61 N. M. 374, 301 P. 2d 317. We have concluded, for the reasons which follow, that the restrictions of the Act are inapplicable to acquisitions by the State for its highway program.

The Act's silence obliges us to examine its purposes, as evidenced by its terms and its legislative history, to de-

[6] In addition, the court suggested that the restrictions of the Enabling Act are inapplicable here because the State obtains less than a fee interest. This contention is plainly foreclosed by the language of § 28, by which "Every sale, lease, conveyance, or contract of or concerning any of the lands" is void unless in substantial conformity with the Act.

termine whether these restrictions should be imposed here. The grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act. It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes. Congress could scarcely have expected, for example, that many of the 8,000,000 acres of its grant "for the support of the common schools," all chosen without regard to topography or school needs, would be employed as building sites.[7] It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.

The central problem which confronted the Act's draftsmen was therefore to devise constraints which would assure that the trust received in full fair compensation for trust lands. The method of transfer and the transferee were material only so far as necessary to assure that the trust sought and obtained appropriate compensation. This is confirmed by the legislative history of the Enabling Act. All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories.[8] Senator Beveridge, the committee's chairman, made clear on the floor

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[7] The school lands were granted according to the rigid checkerboard pattern of the federal survey. Four sections per township were granted by number for the support of common schools, instead of the one section per township ordinarily given in the earlier grants, because the unappropriated lands in Arizona and New Mexico were largely of so little value. Orfield, Federal Land Grants to the States 45.

[8] S. Rep. No. 454, 61st Cong., 2d Sess., 18.

of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898.[9] The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depredations here by requiring public notice and sale.[10] The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands. We see no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation.

Further, we should not fail to recognize that, were we to require Arizona to follow precisely these procedures, we would sanction an empty formality. There would not often be others to bid for the material sites and rights of way which the State might seek. More important, even if such bidders appeared and proved successful, nothing in the grant would prevent Arizona from thereafter condemning the land which it had failed to purchase; the anticipation of condemnation would leave the auction without any real significance. We cannot see that the trust would materially benefit from this circuity.

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[9] Remarks of Senator Beveridge, 45 Cong. Rec. 8227.

[10] *Ibid.* These violations culminated in a series of lawsuits brought by the Department of Justice against those privy to them. These lawsuits were pending when the Enabling Act was under study by Congress. The importance of this episode is also indicated in the committee's report. S. Rep. No. 454, 61st Cong., 2d Sess., 19–20.

We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question the transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The State may instead employ the procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the trust and to prevent misapplication of its lands and funds.

II.

The second issue here is the standard of compensation which Arizona must employ to recompense the trust for the land it acquires. The Land Commissioner's rules provide simply that the State must pay the appraised value, as measured by the State's condemnation statute, of the right of way or material site. The Highway Department urges, and the Arizona Supreme Court held, that nothing need ever be actually paid since it may be conclusively presumed that all highways enhance the value of the remaining trust lands in amounts at least equal to the value of the lands which were taken. The United States, as *amicus curiae*, suggests that the Highway Department be obliged to pay the land's appraised value, but that it be permitted to reduce that sum by the amount of any enhancement shown in the value of the remaining trust lands. The rule urged by the United States differs from that adopted by the state court only in that the United States would not permit the Highway Department to presume enhancement, but would instead require that it be established by the Department in each instance with reasonable certainty and precision. Under this rule, enhancement would have to be individually

proved and computed for small tracts of land checkered over the entire State.

We are urged by the United States to determine only the validity of the rule of law stated by the Arizona Supreme Court, and to defer the broader question of whether enhancement may ever be permitted to diminish the actual compensation payable to the trust. The United States emphasizes that the broader issue does not directly arise under the Commissioner's rules, since the Arizona condemnation statute incorporated by those rules does not permit benefits to reduce the compensation payable for the condemned land's fair market value.[11] We are unable to take so narrow a view. The rule adopted by the state court clearly stemmed from, and depended upon, the premise that enhancement may be balanced against the value of the trust lands taken by the State. If we severed the conclusion from its premise, we would halt short of a full adjudication of the validity of the Commissioner's rules, and unnecessarily prolong the litigation of this important question. We have therefore reached the broader issue, and have concluded that the terms and purposes of the grant do not permit Arizona to diminish the actual compensation, meaning thereby monetary compensation, payable to the trust by the amount of any enhancement in the value of the remaining trust lands.

The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value,"

[11] Ariz. Rev. Stat. Ann. § 12–1122. The statute permits benefits to reduce any damages caused by severance to the uncondemned portions of a parcel of land, but not to reduce the compensation paid for the land which is condemned.

and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained . . . ." [12] The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum.[13] Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." *Ervien* v. *United States*, 251 U. S. 41, 47. The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" [14] from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." *United States* v. *Ervien*, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.

This is confirmed by the background and legislative history of the Enabling Act. The restrictions placed upon land grants to the States became steadily more rigid and specific in the 50 years prior to this Act, as Congress

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[12] 36 Stat. 574.

[13] *Ibid.* The Act fixed a minimum price of $3 per acre in Arizona. This requirement was removed by the Act of June 5, 1936. 49 Stat. 1477. The Act still requires that land "susceptible of irrigation" under federal or other projects not be sold for less than $25 per acre. 36 Stat. 574.

[14] 36 Stat. 574.

sought to require prudent management and thereby to preserve the usefulness of the grants for their intended purposes.[15] The Senate Committee on the Territories, with the assistance of the Department of Justice,[16] adopted for the New Mexico-Arizona Act the most satisfactory of the restrictions contained in the earlier grants. Its premise was that the grants cannot "be too carefully safeguarded for the purpose for which they are appropriated." [17] Senator Beveridge described the restrictions as "quite the most important item" in the Enabling Act, and emphasized that his committee believed that "we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes." [18]

Nothing in these restrictions is explicitly addressed to acquisitions by the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries "derive the full benefit" [19] of the grant. The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of that purpose, particularly in the context of lands that are as variegated and far-flung as those comprised in this grant. And we think that the more particularized showing of enhancement advocated by the United States, resting as it largely would upon the forecasts of experts which by nature

[15] Orfield, Federal Land Grants to the States 48–52.

[16] S. Rep. No. 454, 61st Cong., 2d Sess., 20.

[17] *Ibid.*

[18] Remarks of Senator Beveridge, 45 Cong. Rec. 8227.

[19] Letter from former Secretary of the Interior Garfield to the House Committee on the Territories. H. R. Rep. No. 152, 61st Cong., 2d Sess., 3.

are subject to the imponderables and hazards of the future, also falls short of assuring accomplishment of the basic intendment of Congress. Acceptance of either of these courses for reimbursing the trust in these circumstances might well result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the State's highway program.[20]

We hold therefore that Arizona must actually compensate the trust in money [21] for the full appraised value of any material sites or rights of way which it obtains on or over trust lands.[22] This standard most nearly reproduces the results of the auction prescribed by the

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[20] Despite widespread use of the value of benefits in computing condemnation awards, the various rules adopted for that purpose have created confusion and difficulties. See Haar & Hering, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833. These problems would be aggravated in the context of this situation, since the benefits would have to be individually computed for tracts of land scattered over the entire State.

[21] We do not mean to suggest that deferred payment arrangements might not be appropriate. Cf. the provisions of § 28 (see Appendix): "no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid." Nor do we mean that exchanges, in the situations in which they are permitted by the Act, would not be appropriate. Cf. the provisions of § 28 (see Appendix): "The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided,* That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder."

[22] We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of any such transfers or the obligations of the State, if any, with respect thereto.

Act, and most consistently reflects the essential purposes of the grant.

The judgment of the Supreme Court of Arizona is accordingly reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

Section 28 of New Mexico-Arizona Enabling Act, as Amended.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have

been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the

protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided,* That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided,* That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or

confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

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Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

Syllabus.

UNITED STATES *v.* LAUB ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 176. Argued November 16, 1966.—Decided January 10, 1967.

Appellees were indicted for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952 by recruiting and arranging the travel to Cuba of 58 United States citizens whose passports, although otherwise valid, were not specifically endorsed for travel to Cuba. Section 215 (b) provides that during wartime or a National Emergency, and when the President finds and proclaims that such restrictions are necessary in the national interest, "it shall . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The required finding and proclamation were made on January 17, 1953, and valid passports were thereafter required of United States citizens except when traveling to or from areas exempted by State Department regulations. After diplomatic relations with Cuba were severed on January 3, 1961, a State Department regulation excluded Cuba from Western Hemisphere countries exempted from the passport requirement. On the same day the Department issued a Public Notice and a press release, declaring outstanding passports invalid for travel to Cuba unless endorsed therefor. Thereafter, appellees allegedly engaged in the charged conspiracy. The District Court dismissed the indictment for failure to state an offense of conspiracy to violate § 215 (b). A direct appeal was taken to this Court. *Held:* Area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b). Pp. 479–487.

(a) "Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.)." P. 480.

(b) As the Government concedes, "Section 215 (b) does not, in so many words, prohibit violations of area restrictions . . . ." P. 480.

(c) "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles*, 357 U. S. 116, 125 (1958). P. 481.

(d) "There is no doubt that with the adoption and promulgation of the 'Excluding Cuba' regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b) . . . . But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense." P. 481.

(e) Neither the State Department's Public Notice nor its press release referred to § 215 (b) or to criminal sanctions. "On the contrary, the only reference to the statutory base of the announcement . . . is a reference to the nonpenal 1926 Act . . . [which authorizes] the Secretary of State to impose area restrictions . . . ." P. 482.

(f) The "unbroken tenor of State Department pronouncements on area restrictions," has cast them "exclusively in civil terms, relating to the State Department's 'safe passage' functions." P. 483.

(g) "Until these indictments . . . the State Department had consistently taken the position that there was no statute which imposed or authorized . . . prohibition" of travel in violation of area restrictions. P. 485.

(h) "The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation . . . [b]ut it was not and was not intended or represented to be an exercise of authority under § 215 (b). . . ." P. 487.

253 F. Supp. 433, affirmed.

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch.*

Leonard B. Boudin argued the cause for appellees. With him on the brief was *Victor Rabinowitz.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellees were indicted under 18 U. S. C. § 371 for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C.

§ 1185 (b). The alleged conspiracy consisted of recruiting and arranging the travel to Cuba of 58 American citizens whose passports, although otherwise valid, were not specifically validated for travel to that country.[1]

The District Court granted appellees' motion to dismiss the indictment. Chief Judge Zavatt filed an exhaustive opinion (253 F. Supp. 433 (D. C. E. D. N. Y.)). Notice of direct appeal to this Court was filed and we noted probable jurisdiction under 18 U. S. C. § 3731 because the dismissal was "based upon the . . . construction of the statute upon which the indictment . . . is founded." We affirm. Our decision rests entirely upon our construction of the relevant statutes and regulations.

Two statutes are relevant to this case. The first is the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a. This is the general statute authorizing the Secretary of State to "grant and issue passports." It is not a criminal statute. The second statute is § 215 (b) of the Immigration and Nationality Act of 1952, *supra*, under which the present indictments were brought. Section 215 (b) was enacted on June 27, 1952. It is a re-enactment of the Act of May 22, 1918 (40 Stat. 559), and the Act of June 21, 1941 (55 Stat. 252). It provides that:

> "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and [when] the President shall find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, *it shall* . . . (b) . . . *be unlawful for any citizen of the United States to depart from or*

[1] In response to a motion for a bill of particulars, the Government alleged that the individuals concerned possessed "unexpired and unrevoked United States passports which . . . had not been specifically validated by the Secretary of State for travel to Cuba."

enter, or attempt to depart from or enter, the United States unless he bears a valid passport." (Italics added.)

Wilful violation is subjected to a fine of not more than $5,000 or imprisonment for five years, or both.

On January 17, 1953, President Truman made the finding and proclamation required by § 215 (b).[2] As a consequence, a valid passport has been required for departure and entry of United States nationals from and into the United States and its territories, except as to areas specifically exempted by regulations. The proclamation adopted the regulations which the Secretary of State had promulgated under the predecessors of § 215 (b) exempting from the passport requirement departure to or entry from "any country or territory in North, Central, or South America [including Cuba]." 22 CFR § 53.3 (b) (1958 rev.). On January 3, 1961, the United States broke diplomatic relations with Cuba. On January 16, 1961, the Deputy Under Secretary of State for Administration issued the "Excluding Cuba" amendment (22 CFR § 53.3 (1965 rev.), 26 Fed. Reg. 482). That amendment added the two words "excluding Cuba" to the phrase quoted above. Cuba was thereby included in the general requirement of a passport for departure from and entry into the United States.

On the same day, the Department of State also issued Public Notice 179, which stated that "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State. . . ." 26 Fed. Reg.

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[2] Proclamation No. 3004, 67 Stat. c31, 3 CFR 180 (1949–1953 Comp.). The current "National Emergency" was proclaimed by President Truman on Dec. 16, 1950. Proclamation No. 2914, 64 Stat. A454, 3 CFR 99 (1949–1953 Comp.).

492. It simultaneously issued a press release announcing that:

> ". . . *in view of the U. S. Government's inability,* following the break in diplomatic relations between the United States and Cuba, *to extend normal protective services to Americans visiting Cuba,* U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports . . . are being declared invalid for travel to Cuba unless specifically endorsed for such travel. . . . *These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.*" [3] (Italics added.)

In *Zemel* v. *Rusk,* 381 U. S. 1 (1965), the petitioner sought a declaratory judgment that the Secretary of State does not have statutory authorization to impose area restrictions on travel; that if the statute were construed to authorize the Secretary to do so, it would be an impermissible delegation of power; and that, in any event, the exercise of the power to restrict travel denied to petitioner his rights under the First and Fifth Amendments. This Court rejected petitioner's claims and sustained the Secretary's statutory power to refuse to validate passports for travel to Cuba. It found authority for area restrictions in the general passport authority vested in the Secretary of State by the 1926 Act, relying upon the successive "imposition of area restrictions during both times of war and periods of peace" before and after the enactment of the Act of 1926. 381 U. S., at

[3] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

8–9. The Court specifically declined the Solicitor General's invitation to rule also that "travel in violation of an area restriction imposed on an otherwise valid passport is unlawful under the 1952 Act." *Id.*, at 12.[4]

We now confront that question. Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.). Appellees urge that § 215 (b) must be read as a "border control" statute, requiring only that a citizen may not "depart from or enter" the United States without "a valid passport." On this basis, they argue, appellees did not conspire to violate the statute since all of those who went to Cuba departed and re-entered the United States bearing valid passports. Only if, as the Government urges, § 215 (b) can be given a broader meaning so as to encompass specific destination control—only if it is read as requiring the traveler to bear "a passport endorsed as valid for travel to the country for which he departs or from which he returns"—would appellees be guilty of any violation.

We begin with the fact, conceded by the Government, that "Section 215 (b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" Brief for the United States, p. 11. Nevertheless, the Government requests us to sustain this criminal prosecution and reverse the District Court on the ground that somehow, "the text is broad enough to encompass departures for geographically restricted areas . . . ." *Ibid.* We conclude, however, that in this criminal proceeding the statute cannot be applied in this fashion. Even if ingenuity were able to find concealed in the text a basis for this

[4] But cf. *United States* v. *Healy*, 376 U. S. 75, 83, n. 7 (1964).

criminal prosecution, factors which we must take into account, drawn from the history of the statute, would preclude such a reading.

Preliminarily, it is essential to recall the nature and function of the passport. A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers. See *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835); *Kent* v. *Dulles*, 357 U. S. 116, 120–121 (1958); 3 Hackworth, Digest of International Law 435 (1942). 8 U. S. C. § 1101 (a)(30).

As this Court has observed, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles*, *supra*, 357 U. S., at 125. See *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517 (1964); *Zemel* v. *Rusk*, 381 U. S. 1 (1965).

Under § 215 (b) and its predecessor statutes, Congress authorized the requirement that a citizen possess a passport for departure from and entry into the United States,[5] and there is no doubt that with the adoption and promulgation of the "Excluding Cuba" regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b), exposing the traveler to the criminal penalties provided in that section. But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense. Violation of the "area restriction"—"invalidating" passports for travel in or to

[5] It is the exception rather than the rule in our history to require that citizens engaged in foreign travel should have a passport. *Kent* v. *Dulles*, 357 U. S. 116, 121–123 (1958); Jaffe, The Right To Travel: The Passport Problem, 35 Foreign Affairs 17 (1956).

Cuba and requiring specific validation of passports if they are to be valid for travel to or in Cuba—is quite a different matter from violation of the requirement of § 215 (b) and the regulations thereunder that a citizen bear a "valid passport" for departure from or entry into the United States.

The area restriction applicable to Cuba was promulgated by a "Public Notice" and a press release, *supra*, pp. 478–479, neither of which referred to § 215 (b) or to criminal sanctions. On the contrary, the only reference to the statutory base of the announcement appears in the "Public Notice," and this is a reference to the nonpenal 1926 Act and the Executive Order adopted thereunder in 1938.[6] These merely authorize the Secretary of State to impose area restrictions incidental to his general powers with respect to passports. *Zemel* v. *Rusk*, *supra*. They do not purport to make travel to the designated area unlawful.

The press release issued by the Department of State at the time expressly explained the action as being "in view of the U. S. Government's inability . . . to extend normal protective services to Americans visiting Cuba." It explained that the action was taken in conformity with the Department's "normal practice" of limiting travel to countries with which we do not have diplomatic relations.[7] That "normal practice," as will be discussed, has not included criminal sanctions. In short, the relevant State Department promulgations are not

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[6] The "Public Notice" recites that "pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of . . . the Act of . . . July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba . . . ." Department of State, Public Notice No. 179, Jan. 16, 1961, 26 Fed. Reg. 492.

[7] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

only devoid of a suggestion that travel to Cuba without a specially validated passport is prohibited, or that such travel would be criminal conduct, but they also contain positive suggestions that the purpose and effect of the restriction were merely to make clear that the passport was not to be regarded by the traveler in Cuba as a voucher on the protective services normally afforded by the State Department.

This was in keeping with the unbroken tenor of State Department pronouncements on area restrictions. Prior to enactment of § 215 (b) on June 27, 1952, area travel restrictions were proclaimed on five occasions while the 1918 and 1941 Acts were in effect (1918–1921 and 1941–1953).[8] These were the predecessors of § 215 (b), and they similarly specified criminal sanctions.[9] But in each of the five instances, the area restrictions were devoid of any suggestion that they were related to the 1918 or 1941 Acts or were intended to invoke criminal penalties if they were disregarded. They were cast exclusively in civil terms, relating to the State Department's "safe passage" functions.[10] In two of these instances, the Department of State specifically emphasized the civil,

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[8] The 1918 Act was in effect by Presidential proclamation only between August 8, 1918, and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and congressional extensions from November 14, 1941 (55 Stat. 1696), to April 1, 1953 (66 Stat. 57, 96, 137, 333), by which date § 215 (b) was already in effect by Presidential Proclamation No. 3004, Jan. 17, 1953, 67 Stat. c31, 3 CFR 180 (1949–1953 Comp.).

[9] See p. 477, *supra*.

[10] 1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law 530 (1942). 2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. State Bull. 399). 3. Restriction in 1951 as to Czechoslovakia (24 Dept. State Bull. 932). 4. Restriction in 1951 as to Hungary (26 Dept. State Bull. 7). 5. Restriction in 1952 as to East European countries, China, and the Soviet Union (26 Dept. State Bull. 736).

nonprohibitory nature of the restrictions.[11] For example, in 1952 the State Department issued area restrictions with respect to Eastern European countries, China, and the Soviet Union. The Department's press release emphasized that the "invalidation" of passports for travel to those areas "in no way forbids American travel to those areas." [12]

Since enactment of § 215 (b), the State Department has announced area travel restrictions upon three occasions in addition to Cuba.[13] Again, although § 215 (b) was fully operative, none of these declarations purported to be issued under that section or referred to criminal sanctions. Each of them, like the Cuba regulation, sounded in terms of withdrawal of the safe-passage services of the State Department.[14]

In 1957, the Senate Foreign Relations Committee asked the Department: "What does it mean when a passport is stamped 'not valid to go to country X'?" After three months, the Department sent its official reply. It stated that this stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States. . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be*

[11] These were the 1919 Germany restriction and the 1952 East Europe, Soviet Union, and China restriction. See n. 10, *supra*. The texts of the Department's announcements of these restrictions are in the Appendix to this opinion.

[12] See the Appendix to this opinion.

[13] 1. Restriction in 1955 as to Albania, Bulgaria, China, North Korea, and North Viet Nam (33 Dept. State Bull. 777). 2. Restriction in 1956 as to Hungary (34 Dept. State Bull. 248). 3. Restriction in 1956 as to Egypt, Israel, Jordan, and Syria (35 Dept. State Bull. 756, 21 Fed. Reg. 8577).

[14] In the 1956 area restriction relating to Egypt, Israel, Jordan, and Syria, *supra*, n. 13, as well as the Cuba restriction, the Department expressly recited the 1926 Act as its basis. It did not mention § 215 (b). 21 Fed. Reg. 8577.

violating the criminal law." [15] (Italics added.) Similarly, in hearings before another Senate Committee, a Department official explained that when a passport is marked "invalid" for travel to stated countries, this means that "this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government." [16]

Although Department records show that approximately 600 persons have violated area travel restrictions since the enactment of § 215 (b),[17] the present prosecutions are the only attempts to convict persons for alleged area transgressions.[18]

Until these indictments, in fact, the State Department had consistently taken the position that there was no statute which imposed or authorized such prohibition. In the 1957 hearings, referred to above, the Acting Director of the Bureau of Security and Consular Affairs, Department of State, testified that he knew of no statute providing a penalty for going to a country covered by an area restriction without a passport (as distinguished from

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[15] Hearings before the Senate Committee on Foreign Relations, on Department of State Passport Policies, 85th Cong., 1st Sess. (1957), p. 59.

[16] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on the Right To Travel, 85th Cong., 1st Sess., part 2 (1957), p. 86; see also *id.*, at 62.

[17] The Government conceded this to the court below. See also the Department's testimony to the same effect in Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Senate Committee on the Judiciary, on S. 3243, 89th Cong., 2d Sess. (1966), p. 43. The Chief of the Security Branch of the Legal Division of the State Department testified to the court below that he was unaware of any prosecution for violation of area restrictions under the predecessors of § 215 (b).

[18] See also *Travis* v. *United States*, No. 67, *post*, p. 491; *Worthy* v. *United States*, 328 F. 2d 386 (C. A. 5th Cir., 1964).

departing or entering the United States).[19] The Government, as well as others, has repeatedly called to the attention of the Congress the need for consideration of legislation specifically making it a criminal offense for any citizen to travel to a country as to which an area restriction is in effect,[20] but no such legislation was enacted.[21]

In view of this overwhelming evidence that § 215 (b) does not authorize area restrictions, we agree with the District Court that the indictment herein does not allege a crime. If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts.

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[19] Hearings, n. 16, *supra*, at 91–95.

[20] See, *e. g.*, President Eisenhower's request for legislation, H. R. Doc. No. 417, 85th Cong., 2d Sess. (1958). The Administration's bill was S. 4110, H. R. 13318. In 1957, the Commission on Government Security, specifically established by Congress to study travel and passport legislation, among other things (Public Law 304, 84th Cong., 1st Sess., 69 Stat. 595 (1955)), recommended that "Title 8, U. S. C. A., section 1185 (b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." Report (S. Doc. 64, 84th Cong.), at 475. The next year, the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York published a report entitled "Freedom To Travel." One of the authors of this Report was the Honorable Adrian S. Fisher, former Legal Advisor to the Department of State. This Report concluded, at 70, as to criminal enforcement of area restrictions:

"The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

[21] The most recent bill, introduced by the Department after two years of study, was H. R. 14895, 89th Cong., 2d Sess. (1966). See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Senate Committee on the Judiciary, on S. 3243, 89th Cong., 2d Sess. (1966), p. 73. Some of the other bills which failed in Congress are discussed in the opinion of the court below.

The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation under the 1926 Act. *Zemel* v. *Rusk, supra.* But it was not and was not intended or represented to be an exercise of authority under § 215 (b), which provides the basis of the criminal charge in this case.

Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.* Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in *Raley* v. *Ohio,* 360 U. S. 423, 438, we may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." As *Raley* emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939)); or if they are "inexplicably contradictory" (citing *United States* v. *Cardiff,* 344 U. S. 174 (1952)); and certainly not if the Government's conduct constitutes "active misleading" (citing *Johnson* v. *United States,* 318 U. S. 189, 197 (1943)).

In view of our decision that appellees were charged with conspiracy to violate a nonexistent criminal prohibition, we need not consider other issues which the case presents.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX TO OPINION OF THE COURT.

The following three Department of State statements in connection with area restrictions are referred to in the foregoing opinion:

(1) State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178:

> "The Department of State announced on January 16 that in view of the U. S. Government's

inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of U. S. citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the U. S. Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations."

(2) State Department Press Release No. 341, May 1, 1952, 26 Dept. State Bull. 736:

"The Department of State announced on May 1 that it was taking additional steps to warn American citizens of the risks of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids

American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: THIS PASSPORT IS NOT VALID FOR TRAVEL TO ALBANIA, BULGARIA, CHINA, CZECHOSLOVAKIA, HUNGARY, POLAND, RUMANIA OR THE UNION OF SOVIET SOCIALIST REPUBLICS UNLESS SPECIFICALLY ENDORSED UNDER AUTHORITY OF THE DEPARTMENT OF STATE AS BEING VALID FOR SUCH TRAVEL.

"All outstanding passports, which are equally subject to the restriction, will be so endorsed as occasion permits."

"Freedom to Travel," a 1958 Report of the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York, characterized this as "an honest admission of the lack of statutory power to enforce an area restriction of this nature." At 70. The Department gave a practical construction of this area restriction in 1954 when it informed two newsmen desiring to travel to Bulgaria that they could go there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport," and that, if Bulgaria would permit them entry, "the Department . . . [would hold] no objection." Hearings on Department of State Passport Policies before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess. (1957), p. 65.

(3) 3 Hackworth, Digest of International Law 530 (1942) (1919 Germany restriction):

"The Department is not now issuing or authorizing issuance or amendment of passports for Ger-

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many. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions."

TRAVIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 67. Argued November 15–16, 1966.—Decided January 10, 1967.

Petitioner was indicted, tried, and found guilty of violating § 215 (b) of the Immigration and Nationality Act for departing from the United States for Cuba, via Mexico, without a valid passport. The parties stipulated that she had no valid passport "specifically endorsed" for travel to Cuba. The Court of Appeals affirmed. *Held:* Because there was no allegation or proof that petitioner did not bear a valid passport, the conviction must be reversed. *United States* v. *Laub, ante,* p. 475. Pp. 491–492.

353 F. 2d 506, reversed.

John T. McTernan argued the cause for petitioner. With him on the briefs was *A. L. Wirin.*

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This is a companion case to No. 176, *United States* v. *Laub, ante,* p. 475. Petitioner was tried on a stipulation of facts, under an indictment which alleged that on two occasions she "did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required" in violation of § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b). The parties stipulated that "At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid

United States passport specifically endorsed for travel to the Republic of Cuba . . . ." This stipulation is all that the record in this case reveals as to petitioner's possession of a valid passport. Petitioner was convicted, and the Court of Appeals affirmed. We granted certiorari in light of the important questions raised by petitioner, and the apparent conflict with the decision of the District Court for the Eastern District of New York in the *Laub* case, *supra*, which we affirm today.

As our decision in *Laub* determines, if petitioner in fact had a valid passport, and the gravamen of the Government's accusation under § 215 (b) were that her passport was not valid for travel to Cuba, this conviction could not stand. We have today held that area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b). Because the Government did not allege, and introduced no proof, that petitioner did not bear a valid passport on each of the occasions on which she departed for Cuba, via Mexico, our decision in *Laub*, *supra*, requires that her conviction be reversed.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Syllabus.

GARRITY ET AL. *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 13. Argued November 10, 1966.—Decided January 16, 1967.

Appellants, police officers in certain New Jersey boroughs, were questioned during the course of a state investigation concerning alleged traffic ticket "fixing." Each officer was first warned that: anything he said might be used against him in a state criminal proceeding; he could refuse to answer if the disclosure would tend to incriminate him; if he refused to answer he would be subject to removal from office. The officers' answers to the questions were used over their objections in subsequent prosecutions, which resulted in their convictions. The State Supreme Court on appeal upheld the convictions despite the claim that the statements of the officers were coerced by reason of the fact that if they refused to answer they could, under the New Jersey forfeiture-of-office statute, lose their positions. That statute provides that a public employee shall be removed from office if he refuses to testify or answer any material question before any commission or body which has the right to inquire about matters relating to his office or employment on the ground that his answer may incriminate him. On the ground that the only real issue in the case was the voluntariness of the statements, the State Supreme Court declined to pass upon the constitutionality of the statute, though the statute was considered relevant for the bearing it had on the voluntary character of the statements used to convict the officers. The officers appealed to this Court under 28 U. S. C. § 1257 (2) and the question of jurisdiction was postponed to a hearing on the merits. *Held:*

1. The forfeiture-of-office statute is too tangentially involved to satisfy the requirements of 28 U. S. C. § 1257 (2). The only bearing it had was whether, valid or not, the choice between being discharged under it for refusal to answer and self-incrimination rendered the statements products of coercion. The appeal is dismissed, the papers are treated as a petition for certiorari, and certiorari is granted. Pp. 495–496.

2. The threat of removal from public office under the forfeiture-of-office statute to induce the petitioners to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements involuntary and therefore inadmissible in the state criminal proceedings. Pp. 496–500.

(a) The choice given petitioners either to forfeit their jobs or to incriminate themselves constituted coercion. Pp. 496–498.

(b) Whether there was a "waiver" is a federal question. P. 498.

(c) Where the choice is "between the rock and the whirlpool" (*Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, 593), the decision to "waive" one or the other is made under duress. P. 498.

Appeal dismissed and certiorari granted; 44 N. J. 209, 207 A. 2d 689; 44 N. J. 259, 208 A. 2d 146, reversed.

Daniel L. O'Connor argued the cause for appellants. With him on the brief was *Eugene Gressman.*

Alan B. Handler, First Assistant Attorney General of New Jersey, argued the cause for appellee. With him on the brief were *Arthur J. Sills,* Attorney General, and *Norman Heine.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.[1]

[1] "Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution,

Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced,[2] by reason of the fact that, if they refused to answer, they could lose their positions with the police department. See 44 N. J. 209, 207 A. 2d 689, 44 N. J. 259, 208 A. 2d 146.

We postponed the question of jurisdiction to a hearing on the merits. 383 U. S. 941. The statute whose validity was sought to be "drawn in question," 28 U. S. C. § 1257 (2), was the forfeiture statute.[3] But the New

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upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this state provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this state." N. J. Rev. Stat. § 2A:81–17.1 (Supp. 1965).

[2] At the trial the court excused the jury and conducted a hearing to determine whether, *inter alia*, the statements were voluntary. The State offered witnesses who testified as to the manner in which the statements were taken; the appellants did not testify at that hearing. The court held the statements to be voluntary.

[3] N. 1, *supra*.

Jersey Supreme Court refused to reach that question (44 N. J., at 223, 207 A. 2d, at 697), deeming the voluntariness of the statements as the only issue presented. *Id.*, at 220–222, 207 A. 2d, at 695–696. The statute is therefore too tangentially involved to satisfy 28 U. S. C. § 1257 (2), for the only bearing it had was whether, valid or not, the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other was "a choice between the rock and the whirlpool" [4] which made the statements products of coercion in violation of the Fourteenth Amendment. We therefore dismiss the appeal, treat the papers as a petition for certiorari (28 U. S. C. § 2103), grant the petition and proceed to the merits.

We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions.

The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers* v. *Florida*, 309 U. S. 227, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206. Subtle pressures (*Leyra* v. *Denno*, 347 U. S. 556; *Haynes* v. *Washington*, 373 U. S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U. S. 219, 241.

We adhere to *Boyd* v. *United States*, 116 U. S. 616, a civil forfeiture action against property. A statute offered

[4] *Stevens* v. *Marks*, 383 U. S. 234, 243, quoting from *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, 593.

the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. *Id.*, at 634–635. It is that principle that we adhere to and apply in *Spevack* v. *Klein, post,* p. 511.

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona,* 384 U. S. 436, 464–465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion [5] inherent in this scheme of questioning

[5] Cf. Lamm, The 5th Amendment and Its Equivalent in Jewish Law, 17 Decalogue Jour. 1 (Jan.–Feb. 1967):

"It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

. . . . . .

"The Halakhah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. . . . While certainly not all, or even most criminal confessions are directly attributable, in whole or part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority

and cannot be sustained as voluntary under our prior decisions.

It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67, 69–70; *Stevens* v. *Marks*, 383 U. S. 234, 243–244. The Court in *Union Pac. R. R. Co.* v. *Pub. Service Comm., supra,* in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . ." *Id.*, at 70.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *Ibid.*

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of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the Fifth Amendment.

"In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations." *Id.*, at 10, 12.

In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. *Abie State Bank* v. *Bryan*, 282 U. S. 765, 776. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N. E. 517, stated a dictum on which New Jersey heavily relies:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.*, at 220, 29 N. E., at 517–518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in *Slochower* v. *Board of Education*, 350 U. S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of

guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id.*, at 557–558.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1. Resort to the federal courts in diversity of citizenship cases is another. *Terral* v. *Burke Constr. Co.*, 257 U. S. 529. Assertion of a First Amendment right is still another. *Lovell* v. *City of Griffin*, 303 U. S. 444; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Thomas* v. *Collins*, 323 U. S. 516; *Lamont* v. *Postmaster General*, 381 U. S. 301, 305–306. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. *Harman* v. *Forssenius*, 380 U. S. 528. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.

[For dissenting opinion of MR. JUSTICE WHITE, see *post*, p. 530.]

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

The majority opinion here and the plurality opinion in *Spevack* v. *Klein*, *post*, p. 511, stem from fundamental misconceptions about the logic and necessities of the

constitutional privilege against self-incrimination. I fear that these opinions will seriously and quite needlessly hinder the protection of other important public values. I must dissent here, as I do in *Spevack*.

The majority employs a curious mixture of doctrines to invalidate these convictions, and I confess to difficulty in perceiving the intended relationships among the various segments of its opinion. I gather that the majority believes that the possibility that these policemen might have been discharged had they refused to provide information pertinent to their public responsibilities is an impermissible "condition" imposed by New Jersey upon petitioners' privilege against self-incrimination. From this premise the majority draws the conclusion that the statements obtained from petitioners after a warning that discharge was possible were inadmissible. Evidently recognizing the weakness of its conclusion, the majority attempts to bring to its support illustrations from the lengthy series of cases in which this Court, in light of all the relevant circumstances, has adjudged the voluntariness *in fact* of statements obtained from accused persons.

The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact, in the same fashion that the statements in *Chambers* v. *Florida*, 309 U. S. 227, and *Haynes* v. *Washington*, 373 U. S. 503, were thought to be involuntary, and that the statements were inadmissible as a matter of law, on the premise that they were products of an impermissible condition imposed on the constitutional privilege. These are very different contentions and require separate replies, but in my opinion both contentions are plainly mistaken, for reasons that follow.

I.

I turn first to the suggestion that these statements were involuntary in fact. An assessment of the voluntariness of the various statements in issue here requires a more comprehensive examination of the pertinent circumstances than the majority has undertaken.

The petitioners were at all material times policemen in the boroughs of Bellmawr and Barrington, New Jersey. Garrity was Bellmawr's chief of police and Virtue one of its police officers; Holroyd, Elwell, and Murray were police officers in Barrington. Another defendant below, Mrs. Naglee, the clerk of Bellmawr's municipal court, has since died. In June 1961 the New Jersey Supreme Court *sua sponte* directed the State's Attorney General to investigate reports of traffic ticket fixing in Bellmawr and Barrington. Subsequent investigations produced evidence that the petitioners, in separate conspiracies, had falsified municipal court records, altered traffic tickets, and diverted moneys produced from bail and fines to unauthorized purposes. In the course of these investigations the State obtained two sworn statements from each of the petitioners; portions of those statements were admitted at trial. The petitioners were convicted in two separate trials of conspiracy to obstruct the proper administration of the state motor traffic laws, the cases being now consolidated for purposes of our review. The Supreme Court of New Jersey affirmed all the convictions.

The first statements were taken from the petitioners by the State's Deputy Attorney General in August and November 1961. All of the usual indicia of duress are wholly absent. As the state court noted, there was "no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, or efforts to humiliate or ridicule the defendants." 44 N. J.

209, 220, 207 A. 2d 689, 695. The state court found no evidence that any of the petitioners were reluctant to offer statements, and concluded that the interrogations were conducted with a "high degree of civility and restraint." *Ibid.*

These conclusions are fully substantiated by the record. The statements of the Bellmawr petitioners were taken in a room in the local firehouse, for which Chief Garrity himself had made arrangements. None of the petitioners were in custody before or after the depositions were taken; each apparently continued to pursue his ordinary duties as a public official of the community. The statements were recorded by a court stenographer, who testified that he witnessed no indications of unwillingness or even significant hesitation on the part of any of the petitioners. The Bellmawr petitioners did not have counsel present, but the Deputy Attorney General testified without contradiction that Garrity had informed him as they strolled between Garrity's office and the firehouse that he had arranged for counsel, but thought that none would be required at that stage. The interrogations were not excessively lengthy, and reasonable efforts were made to assure the physical comfort of the witnesses. Mrs. Naglee, the clerk of the Bellmawr municipal court, who was known to suffer from a heart ailment, was assured that questioning would cease if she felt any discomfort.

The circumstances in which the depositions of the Barrington petitioners were taken are less certain, for the New Jersey Supreme Court found that there was an informal agreement at the Barrington trial that the defendants would argue simply that the possibility of dismissal made the statements "involuntary as a matter of law." The defense did not contend that the statements were the result of physical or mental coercion, or that the wills of the Barrington petitioners were overborne. Accordingly, the State was never obliged to offer evidence

of the voluntariness in fact of the statements. We are, however, informed that the three Barrington petitioners had counsel present as their depositions were taken. Insofar as the majority suggests that the Barrington statements are involuntary in fact, in the fashion of *Chambers* or *Haynes*, it has introduced a factual contention never urged by the Barrington petitioners and never considered by the courts of New Jersey.

As interrogation commenced, each of the petitioners was sworn, carefully informed that he need not give any information, reminded that any information given might be used in a subsequent criminal prosecution, and warned that as a police officer he was subject to a proceeding to discharge him if he failed to provide information relevant to his public responsibilities. The cautionary statements varied slightly, but all, except that given to Mrs. Naglee, included each of the three warnings.[1] Mrs. Naglee was

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[1] The warning given to Chief Garrity is typical. "I want to advise you that anything you say must be said of your own free will and accord without any threats or promises or coercion, and anything you say may be, of course, used against you or any other person in any subsequent criminal proceedings in the courts of our state.

"You do have, under our law, as you probably know, a privilege to refuse to make any disclosure which may tend to incriminate you. If you make a disclosure with knowledge of this right or privilege, voluntarily, you thereby waive that right or privilege in relation to any other questions which I might put to you relevant to such disclosure in this investigation.

"This right or privilege which you have is somewhat limited to the extent that you as a police officer under the laws of our state, may be subjected to a proceeding to have you removed from office if you refuse to answer a question put to you under oath pertaining to your office or your function within that office. It doesn't mean, however, you can't exercise the right. You do have the right."

A. "No, I will cooperate."

Q. "Understanding this, are you willing to proceed at this time and answer any questions?"

A. "Yes."

not told that she could be removed from her position at the court if she failed to give information pertinent to the discharge of her duties. All of the petitioners consented to give statements, none displayed any significant hesitation, and none suggested that the decision to offer information was motivated by the possibility of discharge.

A second statement was obtained from each of the petitioners in September and December 1962. These statements were not materially different in content or circumstances from the first. The only significant distinction was that the interrogator did not advert even obliquely to any possibility of dismissal. All the petitioners were cautioned that they were entitled to remain silent, and there was no evidence whatever of physical or mental coercion.

All of the petitioners testified at trial, and gave evidence essentially consistent with the statements taken from them. At a preliminary hearing conducted at the Bellmawr trial to determine the voluntariness of the statements, the Bellmawr petitioners offered no evidence beyond proof of the warning given them.

The standards employed by the Court to assess the voluntariness of an accused's statements have reflected a number of values, and thus have emphasized a variety of factual criteria. The criteria employed have included threats of imminent danger, *Payne* v. *Arkansas*, 356 U. S. 560, physical deprivations, *Reck* v. *Pate*, 367 U. S. 433, repeated or extended interrogation, *Chambers* v. *Florida*, 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California*, 357 U. S. 433, length and illegality of detention under state law, *Haynes* v. *Washington*, 373 U. S. 503, individual weakness or incapacity, *Lynumn* v. *Illinois*, 372 U. S. 528, and the adequacy of warnings of constitutional rights, *Davis* v. *North Carolina*, 384 U. S. 737. Whatever the criteria employed, the duty of the Court has been "to examine the entire

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record," and thereby to determine whether the accused's will "was overborne by the sustained pressures upon him." *Davis* v. *North Carolina*, 384 U. S. 737, 741, 739.

It would be difficult to imagine interrogations to which these criteria of duress were more completely inapplicable, or in which the requirements which have subsequently been imposed by this Court on police questioning were more thoroughly satisfied. Each of the petitioners received a complete and explicit reminder of his constitutional privilege. Three of the petitioners had counsel present; at least a fourth had consulted counsel but freely determined that his presence was unnecessary. These petitioners were not in any fashion "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . ." *Miranda* v. *Arizona*, 384 U. S. 436, 461. I think it manifest that, under the standards developed by this Court to assess voluntariness, there is no basis for saying that any of these statements were made involuntarily.

II.

The issue remaining is whether the statements were inadmissible because they were "involuntary as a matter of law," in that they were given after a warning that New Jersey policemen may be discharged for failure to provide information pertinent to their public responsibilities. What is really involved on this score, however, is not in truth a question of "voluntariness" at all, but rather whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible. Absent evidence of involuntariness in fact, the admissibility of these statements thus hinges on the validity of the consequence which the State acknowledged might have resulted if the statements had not been given. If the consequence is

constitutionally permissible, there can surely be no objection if the State cautions the witness that it may follow if he remains silent. If both the consequence and the warning are constitutionally permissible, a witness is obliged, in order to prevent the use of his statements against him in a criminal prosecution, to prove under the standards established since *Brown* v. *Mississippi*, 297 U. S. 278, that as a matter of fact the statements were involuntarily made. The central issues here are therefore identical to those presented in *Spevack* v. *Klein*, *supra:* whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible. For reasons which I have stated in *Spevack* v. *Klein*, in my view nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.

It can hardly be denied that New Jersey is permitted by the Constitution to establish reasonable qualifications and standards of conduct for its public employees. Nor can it be said that it is arbitrary or unreasonable for New Jersey to insist that its employees furnish the appropriate authorities with information pertinent to their employment. Cf. *Beilan* v. *Board of Education*, 357 U. S. 399; *Slochower* v. *Board of Education*, 350 U. S. 551. Finally, it is surely plain that New Jersey may in particular require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious here, where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of jus-

tice of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal prosecutions precisely on the ground that this might encourage high standards of police behavior. See, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Miranda* v. *Arizona*, *supra*. It must be concluded, therefore, that the sanction at issue here is reasonably calculated to serve the most basic interests of the citizens of New Jersey.

The final question is the hazard, if any, which this sanction presents to the constitutional privilege. The purposes for which, and the circumstances in which, an officer's discharge might be ordered under New Jersey law plainly may vary. It is of course possible that discharge might in a given case be predicated on an imputation of guilt drawn from the use of the privilege, as was thought by this Court to have occurred in *Slochower* v. *Board of Education*, *supra*. But from our vantage point, it would be quite improper to assume that New Jersey will employ these procedures for purposes other than to assess in good faith an employee's continued fitness for public employment. This Court, when a state procedure for investigating the loyalty and fitness of public employees might result either in the *Slochower* situation or in an assessment in good faith of an employee, has until today consistently paused to examine the actual circumstances of each case. *Beilan* v. *Board of Education*, *supra*; *Nelson* v. *Los Angeles County*, 362 U. S. 1. I am unable to see any justification for the majority's abandonment of that process; it is well calculated both to protect the essential purposes of the privilege and to guarantee the most generous opportunities for the pursuit of other public values. The majority's broad prohibition, on the other hand, extends the scope of the privilege beyond its essential purposes, and seriously hampers the protection of other important values. Despite the majority's

disclaimer, it is quite plain that the logic of its prohibitory rule would in this situation prevent the discharge of these policemen. It would therefore entirely forbid a sanction which presents, at least on its face, no hazard to the purposes of the constitutional privilege, and which may reasonably be expected to serve important public interests. We are not entitled to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence, but must instead presume that this procedure is only intended and will only be used to establish and enforce standards of conduct for public employees.[2] As such, it does not minimize or endanger the petitioners' constitutional privilege against self-incrimination.[3]

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[2] The legislative history of N. J. Rev. Stat. 2A:81–17.1 provides nothing which clearly indicates the purposes of the statute, beyond what is to be inferred from its face. In any event, the New Jersey Supreme Court noted below that the State would be entitled, even without the statutory authorization, to discharge state employees who declined to provide information relevant to their official responsibilities. There is therefore nothing to which this Court could properly now look to forecast the purposes for which or circumstances in which New Jersey might discharge those who have invoked the constitutional privilege.

[3] The late Judge Jerome Frank thus once noted, in the course of a spirited defense of the privilege, that it would be entirely permissible to discharge police officers who decline, on grounds of the privilege, to disclose information pertinent to their public responsibilities. Judge Frank quoted the following with approval:

"'*Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers.* They claim that they had a constitutional right to refuse to answer under the circumstances, but . . . *they had no constitutional right to remain police officers* in the face of their clear violation of the duty imposed upon them.' Christal v. Police Commission of San Francisco." Citing 33 Cal. App. 2d 564, 92 P. 2d 416. (Emphasis added by Judge Frank.) *United States* v. *Field*, 193 F. 2d 92, 106 (separate opinion).

I would therefore conclude that the sanction provided by the State is constitutionally permissible. From this, it surely follows that the warning given of the possibility of discharge is constitutionally unobjectionable. Given the constitutionality both of the sanction and of the warning of its application, the petitioners would be constitutionally entitled to exclude the use of their statements as evidence in a criminal prosecution against them only if it is found that the statements were, when given, involuntary in fact. For the reasons stated above, I cannot agree that these statements were involuntary in fact.

I would affirm the judgments of the Supreme Court of New Jersey.

Syllabus.

SPEVACK *v.* KLEIN.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 62. Argued November 7, 1966.—Decided January 16, 1967.

In a proceeding to discipline petitioner, a member of the New York bar, for professional misconduct for failure to produce demanded financial records and for refusal to testify at a judicial inquiry, petitioner defended on the ground that production of the records and his testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered him disbarred, holding that the privilege against self-incrimination was not available in light of *Cohen* v. *Hurley*, 366 U. S. 117. The New York Court of Appeals affirmed on the authority of *Cohen* v. *Hurley*, and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but for records required by the Appellate Division to be kept by an attorney. *Held:* The judgment is reversed. Pp. 512–520.

16 N. Y. 2d 1048, 213 N. E. 2d 457, 17 N. Y. 2d 490, 214 N. E. 2d 373, reversed.

MR. JUSTICE DOUGLAS, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN, concluded that:

1. The Self-Incrimination Clause of the Fifth Amendment, which has been absorbed in the Fourteenth, extends its protection to lawyers, and should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a penalty for asserting it. *Cohen* v. *Hurley*, *supra*, is overruled. Pp. 514–516.

2. Since petitioner had been disbarred on the theory that the privilege against self-incrimination was applicable to the demanded records, but that the invocation of the privilege could lead to disbarment, his disbarment cannot be affirmed on the ground that the privilege was not applicable thereto in the first place, as that would deny him an opportunity to show that the records demanded were outside the scope of the court rule requiring attorneys to keep records relating to contingent fee cases, and that the records demanded had no "public aspects." Pp. 516–519.

MR. JUSTICE FORTAS concluded that:

1. *Cohen* v. *Hurley* should be overruled, and petitioner cannot be disbarred for asserting his privilege against self-incrimination. Pp. 519–520.

2. The right of a lawyer, who is not an employee of the State, to remain silent, is to be distinguished from that of a public employee who is asked questions by his employer directly relating to the performance of his official duties. P. 519.

3. As stated in MR. JUSTICE DOUGLAS' opinion, the issue of the validity and scope of the required records doctrine is not appropriately presented here. P. 520.

Lawrence J. Latto argued the cause for petitioner. With him on the briefs were *William H. Dempsey, Jr.*, and *Martin J. Flynn.*

Solomon A. Klein, respondent, *pro se*, argued the cause and filed a brief.

Briefs of *amici curiae*, urging reversal, were filed by *Israel Steingold*, for the American Trial Lawyers Association; *Herman B. Gerringer* for the New York State Association of Trial Lawyers; *Ralph Shapiro* for the New York City Chapter of the National Lawyers Guild; and by *Emanuel Redfield* for the New York Civil Liberties Union.

John G. Bonomi filed a brief for the Association of the Bar of the City of New York, as *amicus curiae*, urging affirmance.

MR. JUSTICE DOUGLAS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur.

This is a proceeding to discipline petitioner, a member of the New York Bar, for professional misconduct. Of the various charges made, only one survived, *viz.*, the refusal of petitioner to honor a *subpoena duces tecum* served on him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry. Petitioner's sole defense was that the production of the records and his testimony would tend

to incriminate him. The Appellate Division of the New York Supreme Court ordered petitioner disbarred, holding that the constitutional privilege against self-incrimination was not available to him in light of our decision in *Cohen* v. *Hurley*, 366 U. S. 117. See 24 App. Div. 2d 653. The Court of Appeals affirmed, 16 N. Y. 2d 1048, 213 N. E. 2d 457, 17 N. Y. 2d 490, 214 N. E. 2d 373. The case is here on certiorari which we granted to determine whether *Cohen* v. *Hurley*, *supra*, had survived *Malloy* v. *Hogan*, 378 U. S. 1.

Cohen v. *Hurley* was a five-to-four decision rendered in 1961. It is practically on all fours with the present case. There, as here, an attorney relying on his privilege against self-incrimination refused to testify and was disbarred. The majority of the Court allowed New York to construe her own privilege against self-incrimination so as not to make it available in judicial inquiries of this character (366 U. S., at 125–127) and went on to hold that the Self-Incrimination Clause of the Fifth Amendment was not applicable to the States by reason of the Fourteenth. *Id.*, at 127–129. The minority took the view that the full sweep of the Fifth Amendment had been absorbed into the Fourteenth and extended its protection to lawyers as well as other persons.

In 1964 the Court in another five-to-four decision held that the Self-Incrimination Clause of the Fifth Amendment was applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U. S. 1. While *Cohen* v. *Hurley* was not overruled, the majority indicated that the principle on which it rested had been seriously eroded. 378 U. S., at 11. One minority view espoused by MR. JUSTICE HARLAN and MR. JUSTICE CLARK stated that *Cohen* v. *Hurley* flatly decided that the Self-Incrimination Clause of the Fifth Amendment was not applicable against the States (*id.*, at 17) and urged that it be fol-

lowed. The others in dissent—MR. JUSTICE WHITE and MR. JUSTICE STEWART—thought that on the facts of the case the privilege was not properly invoked and that the state trial judge should have been sustained in ruling that the answers would not tend to incriminate. *Id.*, at 33–38.

The Appellate Division distinguished *Malloy* v. *Hogan* on the ground that there the petitioner was not a member of the Bar. 24 App. Div. 2d, at 654. And the Court of Appeals rested squarely on *Cohen* v. *Hurley* as one of the two grounds for affirmance.[1]

And so the question emerges whether the principle of *Malloy* v. *Hogan* is inapplicable because petitioner is a member of the Bar. We conclude that *Cohen* v. *Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. These views, expounded in the dissents in *Cohen* v. *Hurley*, need not be elaborated again.

We said in *Malloy* v. *Hogan*:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U. S., at 8.[2]

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[1] "Order affirmed on the authority of *Cohen* v. *Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U. S. 582; *Shapiro* v. *United States*, 335 U. S. 1)." 16 N. Y. 2d 1048, 1050, 213 N. E. 2d 457–458.

[2] *Kimm* v. *Rosenberg*, 363 U. S. 405, much relied on here, was a five-to-four decision the other way and accurately reflected the pre-

In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California*, 380 U. S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." *Id.*, at 614. We held in that case that the Fifth Amendment, operating through the Fourteenth, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.*, at 615. What we said in *Malloy* and *Griffin* is in the tradition of the broad protection given the privilege at least since *Boyd* v. *United States*, 116 U. S. 616, 634–635, where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." 116 U. S., at 635.

Malloy v. *Hogan* construction of the Fifth Amendment. We do not stop to re-examine all the other prior decisions of that vintage to determine which of them, if any, would be decided the other way because of "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and *to suffer no penalty . . . for such silence*," as declared in *Malloy* v. *Hogan*, *supra*, at 8. (Italics added.)

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . ." *United States* v. *White*, 322 U. S. 694, 698. As we recently stated in *Miranda* v. *Arizona*, 384 U. S. 436, 461, "In this Court, the privilege has consistently been accorded a liberal construction." It is in that tradition that we overrule *Cohen* v. *Hurley*. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person . . . shall be compelled in any criminal case to be a witness against himself"; and we can imply no exception. Like the school teacher in *Slochower* v. *Board of Education*, 350 U. S. 551, and the policemen in *Garrity* v. *New Jersey*,[3] *ante*, p. 493, lawyers also enjoy first-class citizenship.

The Court of Appeals alternately affirmed the judgment disbarring petitioner on the ground that under *Shapiro* v. *United States*, 335 U. S. 1, and the required records doctrine he was under a duty to produce the withheld records. The Court of Appeals did not elaborate on the point; nor did the Appellate Division advert to it. At the time in question the only Rule governing the matter was entitled "Preservation of records of actions, claims and proceedings."[4] It provided that in cases involving "contingent fee compensation" attorneys

[3] Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach.

[4] Rule 5 of the Special Rules of the Second Dept., Appellate Division. Rule 5 was subsequently amended and renumbered as Special Rule IV (6). See Civil Practice Annual of New York 9–24 (1964).

for all the parties shall preserve "the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

The documents sought in the subpoena were petitioner's daybook, cash receipts book, cash disbursements book, checkbook stubs, petty cashbook and vouchers, general ledger and journal, canceled checks and bank statements, passbooks and other evidences of accounts, record of loans made, payroll records, and state and federal tax returns and worksheets relative thereto.

The *Shapiro* case dealt with a federal price control regulation requiring merchants to keep sales records. The Court called them records with "public aspects," as distinguished from private papers (335 U. S., at 34); and concluded by a divided vote that their compelled production did not violate the Fifth Amendment. We are asked to overrule *Shapiro*. But we find it unnecessary to reach it.

Rule 5, requiring the keeping of records, was broad and general—"the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof." The detailed financial aspects of contingent-fee litigation demanded might possibly by a broad, generous construction of the Rule be brought within its intendment. Our problem, however, is different. Neither the referee of the inquiry, nor counsel for the inquiry, nor the Appellate Division of the New York Supreme Court questioned the applicability of the privilege against self-incrimination *to the records.* All proceeded on the basis that petitioner could invoke the privilege with respect to the

records, but that the price he might have to pay was disbarment. The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable *to the records.* Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records,* but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole* v. *Arkansas,* 333 U. S. 196, 201. For that procedure would deny him all opportunity at the trial to show that the Rule, fairly construed and understood, should not be given a broad sweep [5] and to

[5] Counsel for respondent conceded on oral argument that the subpoena was broader than Rule 5:

"Q. Is this subpoena coextensive with the provisions of the order about keeping the financial records or does the subpoena go beyond?

"A. I would say in my judgment it goes beyond. . . . There is room for reasonable argument that some of the items called for in the subpoena might perhaps be argued to not come within the required records I am talking about.

"Q. Would you mind relating those to us? Tell us what those are. . . . Cash disbursements?

"A. I would say do come under the records. . . . I would exclude as not coming within the statute the federal and state tax returns for example. . . .

"Q. How about worksheets . . . ?

"A. Worksheets? Out. . . .

"Q. You mean all of item 12 . . . would be out?

"A. Item 12—copies of federal and state tax returns, accountants' worksheets, and all other . . . I do not include them.

"Q. They would all be outside the rules?

"A. Yes.

. . . . .

"Q. But the demand was for records beyond the records that he was required to keep.

. . . . .

"A. [T]he New York Court of Appeals, speaking for the State of New York, says these are required records.

"Q. I suppose that if he produced just the records that were re-

make a record that the documents demanded by the subpoena had no "public aspects" within the required records rule but were private papers.

Reversed.

MR. JUSTICE FORTAS, concurring in the judgment.

I agree that *Cohen* v. *Hurley*, 366 U. S. 117 (1961), should be overruled. But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this

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quired—that he was required to keep—that that might very well constitute a waiver as to other records.

"A. No, no it would not. . . .

"Q. Why not?

"A. Because if the other records were held not to come within the required records doctrine he would have the privilege to do that, but he has no privilege.

"Q. I am not sure. Are you sure about that? . . . I would say that the common understanding is that if he produces some of the records relating to a given subject matter, that is a waiver of privilege as to the balance of the records relating to the subject matter. Am I wrong about that?

"A. I would not agree with that. It is an argument that could be made but I would disagree with it for this reason. Under the doctrine of *Shapiro* v. *United States*, he has no Fifth Amendment privilege as to records that are required to be kept. He does have Fifth Amendment privilege as to records he is not required to keep and also as to refusal to give oral testimony."

lash in a subsequent criminal proceeding. *Garrity* v. *New Jersey, ante,* p. 493.

But a lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. His responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as part of its licensing procedures. The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights. Accordingly, I agree that Spevack could not be disbarred for asserting his privilege against self-incrimination.

If this case presented the question whether a lawyer might be disbarred for refusal to keep or to produce, upon properly authorized and particularized demand, records which the lawyer was lawfully and properly required to keep by the State as a proper part of its functions in relation to him as licensor of his high calling, I should feel compelled to vote to affirm, although I would be prepared in an appropriate case to re-examine the scope of the principle announced in *Shapiro* v. *United States,* 335 U. S. 1 (1948). I am not prepared to indicate doubt as to the essential validity of *Shapiro.* However, I agree that the required records issue is not appropriately presented here, for the reasons stated by my Brother DOUGLAS. On this basis I join in the judgment of the Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

This decision, made in the name of the Constitution, permits a lawyer suspected of professional misconduct to thwart direct official inquiry of him without fear of disciplinary action. What is done today will be dis-

heartening and frustrating to courts and bar associations throughout the country in their efforts to maintain high standards at the bar.

It exposes this Court itself to the possible indignity that it may one day have to admit to its own bar such a lawyer unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking. For I can perceive no distinction between "admission" and "disbarment" in the rationale of what is now held. The decision might even lend some color of support for justifying the appointment to the bench of a lawyer who, like petitioner, prevents full inquiry into his professional behavior. And, still more pervasively, this decision can hardly fail to encourage oncoming generations of lawyers to think of their calling as imposing on them no higher standards of behavior than might be acceptable in the general marketplace. The soundness of a constitutional doctrine carrying such denigrating import for our profession is surely suspect on its face.

Six years ago a majority of this Court, in *Cohen* v. *Hurley*, 366 U. S. 117, set its face against the doctrine that now prevails, bringing to bear in support of the Court's holding, among other things, the then-established constitutional proposition that the Fourteenth Amendment did not make applicable to the States the Fifth Amendment as such. Three years later another majority of the Court, in *Malloy* v. *Hogan*, 378 U. S. 1, decided to make the Fifth Amendment applicable to the States and in doing so cast doubt on the continuing vitality of *Cohen* v. *Hurley*. The question now is whether *Malloy* requires the overruling of *Cohen* in its entirety. For reasons that follow I think it clear that it does not.

It should first be emphasized that the issue here is plainly not whether lawyers may "enjoy first-class citi-

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zenship." Nor is the issue whether lawyers may be deprived of their federal privilege against self-incrimination, whether or not criminal prosecution is undertaken against them. These diversionary questions have of course not been presented or even remotely suggested by this case either here or in the courts of New York. The plurality opinion's vivid rhetoric thus serves only to obscure the issues with which we are actually confronted, and to hinder their serious consideration. The true question here is instead the proper scope and effect of the privilege against self-incrimination under the Fourteenth Amendment in state disciplinary proceedings against attorneys.[1] In particular, we are required to determine whether petitioner's disbarment for his failure to provide information relevant to charges of misconduct in carrying on his law practice impermissibly vitiated the protection afforded by the privilege. This important question warrants more complete and discriminating analysis than that given to it by the plurality opinion.

This Court reiterated only last Term that the constitutional privilege against self-incrimination "has never been given the full scope which the values it helps to protect suggest." *Schmerber* v. *California*, 384 U. S. 757, 762. The Constitution contains no formulae with which we can calculate the areas within this "full scope" to which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege. In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests

[1] No claim has been made either here or in the state courts that the underlying facts representing petitioner's alleged conduct were not such as to entitle him to claim the privilege against self-incrimination. We therefore deal with the case on the premise that his claim of privilege was properly asserted.

involved. See, *e. g.*, *Orloff* v. *Willoughby*, 345 U. S. 83; *Davis* v. *United States*, 328 U. S. 582; *Shapiro* v. *United States*, 335 U. S. 1. If, as *Malloy* v. *Hogan*, *supra*, suggests, the federal standards imposed by the Fifth Amendment are now to be extended to the States through the Fourteenth Amendment, see also *Griffin* v. *California*, 380 U. S. 609, it would follow that these same factors must be no less relevant in cases centering on Fourteenth Amendment claims. In any event, the construction consistently given to the Fourteenth Amendment by this Court would require their consideration. *Bates* v. *City of Little Rock*, 361 U. S. 516. I therefore first turn to these factors to assess the validity under the Fourteenth Amendment of petitioner's disbarment.

It cannot be claimed that the purposes served by the New York rules at issue here, compendiously aimed at "ambulance chasing" and its attendant evils, are unimportant or unrelated to the protection of legitimate state interests. This Court has often held that the States have broad authority to devise both requirements for admission and standards of practice for those who wish to enter the professions. *E. g.*, *Hawker* v. *New York*, 170 U. S. 189; *Dent* v. *West Virginia*, 129 U. S. 114; *Barsky* v. *Board of Regents*, 347 U. S. 442. The States may demand any qualifications which have "a rational connection with the applicant's fitness or capacity," *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239, and may exclude any applicant who fails to satisfy them. In particular, a State may require evidence of good character, and may place the onus of its production upon the applicant. *Konigsberg* v. *State Bar of California*, 366 U. S. 36. Finally, a State may without constitutional objection require in the same fashion continuing evidence of professional and moral fitness as a condition of the retention of the right to practice. *Cohen* v. *Hurley*, 366 U. S. 117. All this is in no way questioned by today's decision.

As one prerequisite of continued practice in New York, the Appellate Division, Second Department, of the Supreme Court of New York has determined that attorneys must actively assist the courts and the appropriate professional groups in the prevention and detection of unethical legal activities. The Second Department demands that attorneys maintain various records, file statements of retainer in certain kinds of cases, and upon request provide information, all relevant to the use by the attorneys of contingent fee arrangements in such cases. These rules are intended to protect the public from the abuses revealed by a lengthy series of investigations of malpractices in the geographical area represented by the Second Department. It cannot be said that these conditions are arbitrary or unreasonable, or that they are unrelated to an attorney's continued fitness to practice. English courts since Edward I have endeavored to regulate the qualification and practice of lawyers, always in hope that this might better assure the integrity and evenhandedness of the administration of justice.[2] Very similar efforts have been made in the United States since the 17th century.[3] These efforts have protected the systems of justice in both countries from abuse, and have directly contributed to public confidence in those systems. Such efforts give appropriate recognition to the principle accepted both here and in England that lawyers are officers of the court who perform a fundamental role in the administration of justice.[4] The rules at issue here are in form and spirit a continua-

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[2] The history of these efforts is outlined in Cohen, A History of the English Bar and *Attornatus* to 1450, 277 *et seq.*, 2 Holdsworth, A History of English Law 317, 504 *et seq.*; 6 *id.*, 431 *et seq.*

[3] These efforts are traced in Warren, History of the American Bar, *passim*.

[4] Evidences of this principle may be found in the opinions of this Court. See, *e. g.*, *Ex parte Bradley*, 7 Wall. 364; *Powell* v. *Alabama*, 287 U. S. 45; *Gideon* v. *Wainwright*, 372 U. S. 335.

tion of these efforts, and accordingly are reasonably calculated to serve the most enduring interests of the citizens of New York.

Without denying the urgency or significance of the public purposes served by these rules, the plurality opinion has seemingly concluded that they may not be enforced because any consequence of a claim of the privilege against self-incrimination which renders that claim "costly" is an "instrument of compulsion" which impermissibly infringes on the protection offered by the privilege. Apart from brief *obiter dicta* in recent opinions of this Court, this broad proposition is entirely without support in the construction hitherto given to the privilege, and is directly inconsistent with a series of cases in which this Court has indicated the principles which are properly applicable here. The Court has not before held that the Federal Government and the States are forbidden to permit any consequences to result from a claim of the privilege; it has instead recognized that such consequences may vary widely in kind and intensity, and that these differences warrant individual examination both of the hazard, if any, offered to the essential purposes of the privilege, and of the public interests protected by the consequence. This process is far better calculated than the broad prohibition embraced by the plurality to serve both the purposes of the privilege and the other important public values which are often at stake in such cases. It would assure the integrity of the privilege, and yet guarantee the most generous opportunities for the pursuit of other public values, by selecting the rule or standard most appropriate for the hazards and characteristics of each consequence.

One such rule has already been plainly approved by this Court. It seems clear to me that this rule is applicable to the situation now before us. The Court has repeatedly recognized that it is permissible to deny a status or authority to a claimant of the privilege against

self-incrimination if his claim has prevented full assessment of his qualifications for the status or authority. Under this rule, the applicant may not both decline to disclose information necessary to demonstrate his fitness, and yet demand that he receive the benefits of the status. He may not by his interjection of the privilege either diminish his obligation to establish his qualifications, or escape the consequences exacted by the State for a failure to satisfy that obligation.

This rule was established by this Court in *Orloff* v. *Willoughby*, 345 U. S. 83. The Court there held that a doctor who refused, under a claim of the privilege against self-incrimination, to divulge whether he was a Communist was not entitled by right to receive a commission as an Army officer, although he had apparently satisfied every other prerequisite for a commission. The Court expressly noted that "[n]o one believes he can be punished" for asserting the privilege, but said that it had "no hesitation" in holding that the petitioner nonetheless could not both rely on the privilege to deny relevant information to the commissioning authorities and demand that he be appointed to a position of "honor and trust." 345 U. S., at 91. The Court concluded that "we cannot doubt that the President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness." *Ibid.*

Analogous problems were involved in *Kimm* v. *Rosenberg*, 363 U. S. 405, in which the Court held that an alien whose deportation had been ordered was ineligible for a discretionary order permitting his voluntary departure. The alien was held to be ineligible because he had failed to establish that he was not affiliated with the Communist Party, in that he refused to answer questions about membership in the Party on grounds that the

answers might incriminate him. The petitioner could not prevent the application of a sanction imposed as a result of his silence by interposing the privilege against self-incrimination as a basis for that silence.

These principles have also been employed by this Court to hold that failure to incriminate one's self can result in denial of the removal of one's case from a state to a federal court, *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, and by the Fourth Circuit to hold that a bankrupt's failure to disclose the disposition of his property, although disclosure might incriminate him, requires the denial of a discharge in bankruptcy. *Kaufman* v. *Hurwitz*, 176 F. 2d 210.

This Court has applied similar principles in a series of cases involving claims under the Fourteenth Amendment. These cases all antedate *Malloy* v. *Hogan*, and thus are presumably now subject to the "federal standards," but until today those standards included the principles of *Orloff* v. *Willoughby*, and *Malloy* v. *Hogan* therefore could not alone require a different result. The fulcrum of these cases has been *Slochower* v. *Board of Education*, 350 U. S. 551. The appellant there was an associate professor at Brooklyn College who invoked the Fifth Amendment privilege before an investigating committee of the United States Senate, and was subsequently discharged from his position at the college by reason of that occurrence. The Court held that his removal was a denial of the due process demanded by the Fourteenth Amendment. Its reasons were apparently two: first, the Board had attached a "sinister meaning," in the form of an imputation of guilt, to Slochower's invocation of the privilege; and second, the Board was not engaged in a bona fide effort to elicit information relevant to assess the "qualifications of its employees." The state authorities "had possessed the pertinent information for 12 years," and in any event the questions put to Slochower

by the committee were "wholly unrelated" to his university functions. 350 U. S., at 558.

The elements of the holding in *Slochower* have subsequently been carefully considered on several occasions by this Court. See, *e. g.*, *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1. These cases, when read with *Slochower*, make plain that so long as state authorities do not derive any imputation of guilt from a claim of the privilege, they may in the course of a bona fide assessment of an employee's fitness for public employment require that the employee disclose information reasonably related to his fitness, and may order his discharge if he declines. Identical principles have been applied by this Court to applicants for admission to the bar who have refused to produce information pertinent to their professional and moral qualifications. *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82. In sum, all these cases adopted principles under the Fourteenth Amendment which are plainly congruent with those applied in *Orloff* v. *Willoughby*, *supra*, and other federal cases to Fifth Amendment claims.

The petitioner here does not contend, and the plurality opinion does not suggest, that the state courts have derived any inference of guilt from petitioner's claim of the privilege. The state courts have expressly disclaimed all such inferences. 24 App. Div. 2d 653, 654. Nor is it suggested that the proceedings against petitioner were not an effort in good faith to assess his qualifications for continued practice in New York, or that the information sought from petitioner was not reasonably relevant to those qualifications. It would therefore follow that under the construction consistently given by this Court both to the privilege under the Fifth Amendment and to the Due Process Clause of the Fourteenth Amendment, petitioner's disbarment is constitutionally permissible.

The plurality opinion does not pause either to acknowledge the previous handling of these issues or to explain why the privilege must now be supposed to forbid all consequences which may result from privileged silence. This is scarcely surprising, for the plurality opinion would create a novel and entirely unnecessary extension of the privilege which would exceed the needs of the privilege's purpose and seriously inhibit the protection of other public interests. The petitioner was not denied his privilege against self-incrimination, nor was he penalized for its use; he was denied his authority to practice law within the State of New York by reason of his failure to satisfy valid obligations imposed by the State as a condition of that authority. The only hazard in this process to the integrity of the privilege is the possibility that it might induce involuntary disclosures of incriminating materials; the sanction precisely calculated to eliminate that hazard is to exclude the use by prosecuting authorities of such materials and of their fruits. This Court has, upon proof of involuntariness, consistently forbidden their use since *Brown* v. *Mississippi*, 297 U. S. 278, and now, as my Brother WHITE has emphasized, the plurality has intensified this protection still further with the broad prohibitory rule it has announced today in *Garrity* v. *New Jersey*, *ante*, p. 493. It is true that this Court has on occasion gone a step further, and forbidden the practices likely to produce involuntary disclosures, but those cases are readily distinguishable. They have uniformly involved either situations in which the entire process was thought both to present excessive risks of coercion and to be foreign to our accusatorial system, as in *Miranda* v. *Arizona*, 384 U. S. 436, or situations in which the only possible purpose of the practice was thought to be to penalize the accused for his use of the constitutional privilege, as in *Griffin* v. *California*, 380 U. S. 609. Both situations are plainly remote from that in issue here. None of the reasons thought to require the prohibitions

established in those cases have any relevance in the situation now before us; nothing in New York's efforts in good faith to assure the integrity of its judicial system destroys, inhibits, or even minimizes the petitioner's constitutional privilege. There is therefore no need to speculate whether lawyers, or those in any other profession or occupation, have waived in some unspecified fashion a measure of the protection afforded by the constitutional privilege; it suffices that the State is earnestly concerned with an urgent public interest, and that it has selected methods for the pursuit of that interest which do not prevent attainment of the privilege's purposes.

I think it manifest that this Court is required neither by the logic of the privilege against self-incrimination nor by previous authority to invalidate these state rules, and thus to overturn the disbarment of the petitioner. Today's application of the privilege serves only to hamper appropriate protection of other fundamental public values.[5]

In view of these conclusions, I find it unnecessary to reach the alternative basis of the Court of Appeals' decision, the "required records doctrine." See *Shapiro* v. *United States*, 335 U. S. 1.

I would affirm the judgment of disbarment.

MR. JUSTICE WHITE, dissenting.*

In No. 13, *Garrity* v. *New Jersey*, the Court apparently holds that in every imaginable circumstance the threat

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[5] It should be noted that the principle that a license or status may be denied to one who refuses, under the shelter of the constitutional privilege, to disclose information pertinent to that status or privilege, has been adopted in a variety of situations by statute. See, *e. g.*, 12 U. S. C. § 481; 47 U. S. C. §§ 308 (b), 312 (a)(4); 5 U. S. C. § 2283.

*[This opinion applies also to No. 13, *Garrity* v. *New Jersey*, *ante*, p. 493.]

of discharge issued by one public officer to another will be impermissible compulsion sufficient to render subsequent answers to questions inadmissible in a criminal proceeding. I would agree that in some, if not in most, cases this would be the proper result. But the circumstances of such confrontations are of infinite variety. Rather than the Court's inflexible, *per se* rule, the matter should be decided on the facts of each particular case. In the situation before us now, I agree with my Brother HARLAN that the findings of the two courts below should not be overturned.

However that may be, with *Garrity* on the books, the Court compounds its error in *Spevack* v. *Klein*, No. 62. The petitioner in that case refused to testify and to produce any of his records. He incriminated himself in no way whatsoever. The Court nevertheless holds that he may not be disbarred for his refusal to do so. Such a rule would seem justifiable only on the ground that it is an essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions. But *Garrity* excludes such statements, and their fruits, from a criminal proceeding and therefore frustrates in advance any effort to compel admissions which could be used to obtain a criminal conviction. I therefore see little legal or practical basis, in terms of the privilege against self-incrimination protected by the Fifth Amendment, for preventing the discharge of a public employee or the disbarment of a lawyer who refuses to talk about the performance of his public duty.†

† The opinion of my Brother DOUGLAS professes not to resolve whether policemen may be discharged for refusing to cooperate with an investigation into alleged misconduct. However, the reasoning used to reach his result in the case of lawyers would seemingly apply with equal persuasiveness in the case of public employees.

In *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, the Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U. S., at 79. To implement this holding the Court further ruled that the Federal Government would be constitutionally prohibited from making any such use of compelled testimony and its fruits. This holding was based on the desirability of accommodating the interests of the State and the Federal Government in investigating and prosecuting crime.

A similar accommodation should be made here, although the multiple interests involved are those of the State alone. The majority does not deny that the State and its citizens have a legitimate interest in ridding themselves of faithless officers. Admittedly, however, in attempting to determine the present qualifications of an employee by consultation with the employee himself, the State may ask for information which, if given, would not only result in a discharge but would be very useful evidence in a criminal proceeding. *Garrity*, in my view, protects against the latter possibility. Consequently, I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment.

In my view, Spevack was properly disbarred. With all due respect, I therefore dissent.

Syllabus.

McLEOD, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD *v.* GENERAL ELECTRIC CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 645. Decided January 16, 1967.*

The union (IUE) filed an unfair labor practice charge against respondent company (GE) under §§ 8 (a)(1) and (5) of the National Labor Relations Act, as amended, because of GE's refusal to bargain collectively over a new contract, such refusal having been based upon IUE's inclusion among the bargaining representatives of persons from other labor organizations. The NLRB's Regional Director issued a complaint and notice of hearing and secured from the District Court a temporary injunction under § 10 (j) restraining GE from declining to meet with IUE's designated representatives. The Court of Appeals, applying a different standard under § 10 (j) from the one used by the District Court, reversed. Thereafter IUE and GE entered into a three-year agreement to replace the expired contract. *Held:* The Court of Appeals' judgment is set aside so that the District Court can determine the effect of the new contract upon the appropriateness of injunctive relief, the proper standard under § 10 (j) being immaterial if relief thereunder is now improper whichever standard is applied.

Certiorari granted; 366 F. 2d 847, set aside and remanded.

Solicitor General Marshall, Richard A. Posner, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for petitioner in No. 645.

Irving Abramson and *Ruth Weyand* for petitioner in No. 774 and for respondent International Union of Electrical, Radio & Machine Workers, AFL–CIO, in No. 645.

David L. Benetar for respondent General Electric Co. in both cases.

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*Together with No. 774, *International Union of Electrical, Radio & Machine Workers, AFL–CIO* v. *General Electric Co. et al.*, also on petition for writ of certiorari to the same court.

PER CURIAM.

The petitions for certiorari are granted. The judgment of the Court of Appeals for the Second Circuit is set aside with direction to that court to enter a new judgment consistent with this opinion.

The Regional Director of the Second Region of the National Labor Relations Board issued a complaint and notice of hearing upon a charge filed by the International Union of Electrical, Radio & Machine Workers, AFL–CIO (IUE). The charge alleged that General Electric Company violated §§ 8 (a)(1) and (5) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. §§ 158 (a)(1) and (5), in refusing to bargain upon the renewal of an expiring collective bargaining agreement because of "the inclusion among the persons designated by the Union to represent it . . . of persons who also represented other labor organizations which engaged in collective bargaining with" the company. Pursuant to § 10 (j) of the Act the Regional Director also obtained a temporary injunction in the District Court for the Southern District of New York restraining the company from "[f]ailing or refusing to meet, confer and bargain collectively in good faith with . . . [IUE], by declining to meet with the selected representatives of . . . [IUE] because of the presence of any representatives of other unions whom IUE and its constituent locals have invited to attend for the purpose of participating in the discussion and advising or consulting with IUE and its constituent locals." The Court of Appeals for the Second Circuit reversed. 366 F. 2d 847. MR. JUSTICE HARLAN stayed the Court of Appeals' judgment pending action on the petition for writ of certiorari filed in No. 645.

The District Court and the Court of Appeals differed regarding the proper standard which should be determinative of the right to injunctive relief under § 10 (j).

The District Court applied a dual test: (1) whether "the impact upon the public interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement," 257 F. Supp. 690, 708, and (2) "whether the Board has 'reasonable cause to believe' that the accused party has been guilty of unfair labor practices." 257 F. Supp., at 709. The Court of Appeals on the other hand considered the proper standard to be whether the Board had "demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm." 366 F. 2d, at 850.

We do not think it appropriate however to decide at this time the proper construction of § 10 (j). For on October 14, 1966, after the decision of the Court of Appeals, the company and IUE agreed upon a three-year collective bargaining agreement to replace the expired contract. We think that the District Court should determine in the first instance the effect of this supervening event upon the appropriateness of injunctive relief. The controversy over the proper standard for injunctive relief is immaterial if such relief is now improper whichever standard is applied. We therefore dissolve the stay granted by MR. JUSTICE HARLAN and set aside the judgment of the Court of Appeals with direction to enter a new judgment setting aside the order of the District Court and remanding to that court for such further proceedings as may be appropriate in light of the supervening event. See *Calhoun* v. *Latimer*, 377 U. S. 263; *Scranton* v. *Drew*, 379 U. S. 40.

It is so ordered.

ALEXANDER *v.* BOARD OF REVIEW, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 892, Misc. Decided January 16, 1967.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Dominic J. Hart for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

McCONAGHY *v.* McCONAGHY.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 929, Misc. Decided January 16, 1967.

239 Cal. App. 2d 601, 48 Cal. Rptr. 845, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SHORT ET AL. *v.* NESS PRODUCE CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 779. Decided January 16, 1967.

263 F. Supp. 586, affirmed.

Robert Y. Thornton, Attorney General of Oregon, and *Harold E. Burke* and *Don Parker*, Assistant Attorneys General, for appellants.

J. Bradley Colburn and *Theodore B. Jensen* for appellee.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

233-653 O - 67 - 41

SIMS *v.* GEORGIA.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 251. Argued December 6–7, 1966.—Decided January 23, 1967.

Where petitioner timely raised the issue of voluntariness of his confession, the testimony on the point was conflicting, and the trial judge failed to rule on the matter but left the question solely to the jury, *held:* reversed and remanded for a hearing in accordance with the rule in *Jackson* v. *Denno,* 378 U. S. 368. The trial judge need not make formal findings of fact or write an opinion, but it must clearly appear from the record that he made a primary finding of voluntariness before the confession was introduced into evidence before the jury. Pp. 542–544.

221 Ga. 190, 144 S. E. 2d 103, reversed and remanded.

Jack Greenberg argued the cause for petitioner. With him on the brief were *James M. Nabrit III, Anthony G. Amsterdam* and *Howard Moore, Jr.*

Dewey Hayes, Solicitor General of Georgia, and *E. Freeman Leverett,* Deputy Assistant Attorney General, argued the cause for respondent. With them on the brief was *Arthur K. Bolton,* Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, a Negro, has been convicted of raping a white woman and has been given the death penalty. He raises five federal questions [1] for consideration by this

[1] The five questions are:

"1. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently coercive circumstances within the doctrine of *Fikes* v. *Alabama,* 352 U. S. 191.

"2. Whether petitioner's Fourteenth Amendment rights were violated by the failure of the Georgia courts to afford a fair and reliable procedure for determining the voluntariness of his alleged coerced

Court, among which is that his Fourteenth Amendment rights to a fair trial were violated by the state trial judge's failure to determine the voluntariness of his alleged confession prior to its admission into evidence before the jury, as required by the rule in *Jackson* v. *Denno,* 378 U. S. 368 (1964). The Supreme Court of Georgia ruled that *Jackson* was not applicable and affirmed petitioner's conviction, *Sims* v. *State,* 221 Ga. 190, 144 S. E. 2d 103. We granted certiorari limited to the five questions, 384 U. S. 998. We have determined that petitioner's case is controlled by *Jackson, supra,* and therefore we do not reach any of the other issues raised.

I.

The record indicates that on April 13, 1963, a 29-year-old white woman was driving home alone in her automobile when petitioner drove up behind her in his car,

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confession in disregard of the principle of *Jackson* v. *Denno,* 378 U. S. 368.

"3. Whether petitioner's Fourteenth Amendment right to counsel as declared in *Escobedo* v. *Illinois,* 378 U. S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

"4. Is a conviction constitutional where:

"(a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;

"(b) the number of Negroes chosen is only 5% of the jurors but they comprise about 20% of the taxpayers; and

"(c) a Negro criminal defendant's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years is disallowed?

"5. Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?"

forced her off the road into a ditch, took the woman from her car into nearby woods and forcibly raped her. When he returned to his car, he could not start the engine so he left the scene on foot. Some four hours later he was apprehended by some Negro workers who had been alerted to be on the watch for him. He told these Negroes that he had attacked a white woman. They then turned petitioner over to their employer who delivered him to two state patrolmen. He was then taken to the office of a Doctor Jackson who had previously examined the victim. Petitioner's clothing was removed in order to test it for blood stains. Petitioner testified that while he was in Doctor Jackson's office he was knocked down, kicked over the right eye and pulled around the floor by his private parts. He was taken to a hospital owned by Doctor Jackson, which was adjacent to his office, where four stitches were taken in his forehead. Thereafter the patrolmen took petitioner to Waycross, Georgia, some 30 miles distant, where he was placed in the county jail. During that evening, he saw a deputy sheriff whom he had known for some 13 years and who was on duty on the same floor of the jail where petitioner was incarcerated. He agreed to make a statement and was taken to an interview room where, in the presence of the sheriff, the deputy sheriff and two police officers, he signed a written confession. Two days later he was arraigned.

Prior to trial petitioner filed a motion to suppress the confession as being the result of coercion. A hearing was held before the court out of the presence of the jury. The sheriff and the deputy testified to the circumstances surrounding the taking and signing of the confession. Petitioner testified as to the abuse he had received while in Doctor Jackson's office. He testified that he "felt pretty rough for about two or three weeks

[after the incident], more on my private than I did on my face" and that he "was paining a right smart." There was no contradictory testimony taken. The court denied the motion to suppress without opinion or findings and the confession was admitted into evidence at petitioner's trial.

At the trial, Doctor Jackson was a witness for the State. On cross-examination he denied that he had knocked petitioner down while the latter was in his office, or that he had kicked him in the forehead but made no mention of the other abuse about which petitioner testified. The doctor stated that petitioner was not abused in his presence but he refused to say whether the patrolmen present abused petitioner as he was not in the office at all times while the petitioner was there with the patrolmen. In this state of the record petitioner's testimony in this regard was left uncontradicted.

II.

There is no actual ruling or finding in the record showing that the trial judge determined the voluntariness of the confession. Although he admitted it into evidence, it appears that he was only following a long-standing state practice that the "State having made out a prima facie case that the alleged confession was freely and voluntarily made, it was a question for the jury to determine on conflicting evidence whether the alleged confession was freely and voluntarily made." *Downs* v. *State,* 208 Ga. 619, 621, 68 S. E. 2d 568, 570. Defense counsel called the court's attention to the *Jackson* v. *Denno* ruling of this Court and stated that he did not "know whether the procedure being followed at this time satisfies the rule decided by the Supreme Court on June 22nd, 1964, that the Court must make judicial determination whether the statement was made voluntarily before it is read to the

jury." In his charge to the jury the judge directed that it was for the jury to determine whether the confession was actually made or not and to disregard it if not made freely and voluntarily.

III.

On appeal to the Supreme Court of Georgia, it was held proper for the trial judge to have left the question of the voluntariness of the confession to the jurors with instructions that they should disregard it if they should determine that it was not, in fact, voluntarily made. Indeed, that court specifically found that the "related facts made a prima facie showing that the statement was freely and voluntarily made and admissible in evidence." 221 Ga., at 198, 144 S. E. 2d, at 110. It therefore seems clear from the opinion of the highest court of Georgia that it has applied its own rule rather than having followed the rule set down in *Jackson* for the procedural determination of the voluntariness of a confession. This conclusion is buttressed by the fact that the court below also found that the "Georgia rule presents the question to the jury without giving them the judgment of the judge." *Id.*, at 200, 144 S. E. 2d, at 111. This is the exact procedural device which is proscribed by the rule in *Jackson*.

IV.

The Supreme Court of Georgia reasoned, however, that *Jackson* was not applicable because of the safeguards that Georgia's laws erect around the use of confessions. It pointed out that under Georgia law, before a confession may be admitted it must be corroborated and a showing made that it was freely and voluntarily given. In addition, the trial judge has the power to set aside the verdict of the jury and grant a new trial if, in his opinion, the jury was in error. The court concluded that the rule in *Jackson* is satisfied by Georgia law and

that "It would be difficult to find a more complete satisfaction of the requirement of Jackson than Georgia provides." *Id.*, at 201, 144 S. E. 2d, at 111. The court also felt that if this not be true, in any event, "the unsound implications of Jackson should not be extended one iota to make it cover cases not explicitly covered by it such as this case where there was no evidence to make any issue of voluntariness. Without an issue there is nothing to try." *Ibid.* We cannot agree. There was a definite, clear-cut issue here. Petitioner testified that Doctor Jackson physically abused him while he was in his office and that he was suffering from that abuse when he made the statement, thereby rendering such confession involuntary and the result of coercion. The doctor admitted that he saw petitioner on the floor of his office; that he helped him disrobe and that he knew that petitioner required hospital treatment because of the laceration over his eye but he denied that petitioner was actually abused in his presence. He was unable to state, however, that the state patrolmen did not commit the alleged offenses against petitioner's person because he was not in the room during the entire time in which the petitioner and the patrolmen were there. In fact, the doctor was quite evasive in his testimony and none of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers and was in conflict with the testimony of the physician. Under *Jackson*, it was for the trial judge to first decide these conflicts and discrepancies. This he failed to do.

Furthermore, Georgia's highest court, in finding that its rule satisfied the requirements of *Jackson*, overlooked the fact that the same safeguards offered by the Georgia practice were present in the procedures of New York in *Jackson* and were rejected by this Court. A constitutional rule was laid down in that case that a jury is

not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given. The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity. Here there has been absolutely no ruling on that issue and it is therefore impossible to know whether the judge thought the confession voluntary or if the jury considered it as such in its determination of guilt. *Jackson*, having been decided June 22, 1964, was binding on the courts of Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed.

The judgment is, therefore, reversed and cause is remanded for a hearing as provided by *Jackson* v. *Denno*, *supra*, at 393–396.[2]

It is so ordered.

MR. JUSTICE BLACK dissents for the reasons stated in his dissent in *Jackson* v. *Denno*, 378 U. S., at 401.

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[2] This disposition is in keeping with the teaching of *Jackson*, *supra*, that "a determination of . . . voluntariness" should occur initially "in the state courts in accordance with valid state procedures . . . before this Court considers the case on direct review or a petition for habeas corpus is filed in a Federal District Court." 378 U. S., at 393.

WHITUS ET AL. *v.* GEORGIA.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 650. Argued December 7, 1966.—Decided January 23, 1967.*

After petitioners, who are Negroes, were convicted of murder in the Georgia courts, they filed a writ of habeas corpus in the federal courts, attacking the composition of the grand and petit juries which indicted and convicted them. The District Court dismissed the writ and the Court of Appeals affirmed. This Court vacated that judgment and remanded to the District Court for a hearing on the claim of discrimination (370 U. S. 728). On remand the District Court dismissed the petition on the ground that the claim had been waived, but the Court of Appeals reversed, holding that Negroes had been systematically excluded from both grand and petit juries, since none had ever served on juries within the memory of witnesses, although 45% of the population of the county was Negro. The Superior Court of Mitchell County then directed the jury commissioners to revise the jury list. Georgia law requires the commissioners to "select from the books of the tax receiver upright and intelligent citizens to serve as jurors." The 1964 tax digest, and those prior thereto, were required by Georgia law to be made up from segregated tax returns and the names of Negroes were designated by having a "(c)" placed opposite their names. The State admits that the revised jury list was made up by reference to the old jury list, which had been condemned, and the 1964 tax digest. Three commissioners testified that they were unaware of the letter "(c)" appearing after Negroes' names in the 1964 digest, that they did not include or exclude anyone on the revised list because of color, that they placed persons on the list who were known to them, and that the revised list had no designation of race on it. While 27.1% of the taxpayers in the county are Negroes, and 42% of the males over 21 are Negroes, only 3 of the 33 prospective grand jurors were Negroes, of whom one served on the 19-member grand jury, and only 7 of the 90 persons used to select a petit jury were Negroes, and none was accepted for the petit jury. *Held:*

1. The proof offered by petitioners, including the use by the State of a system of jury selection which had been previously

*Together with No. 253, *Whitus et al.* v. *Georgia*, on certiorari to the Court of Appeals of Georgia.

condemned, constituted a prima facie case of purposeful discrimination, which shifted the burden of proof to the State. The State, which submitted no explanation for the continued use of the condemned system and provided no testimony indicating that the 27.1% of the Negroes on the tax digest were not fully qualified, failed to meet the burden of rebutting the prima facie case. Pp. 550–552.

2. Persons whose state court convictions are set aside for jury discrimination may be retried by the State under procedures which conform to constitutional requirements. Pp. 552–553.

No. 650, 222 Ga. 103, 114, 149 S. E. 2d 130, reversed; No. 253, 112 Ga. App. 328, 145 S. E. 2d 83, dismissed.

Charles Morgan, Jr., and *P. Walter Jones* argued the cause and filed briefs for petitioners in both cases.

Fred B. Hand, Jr., Solicitor General of Georgia, and *E. Freeman Leverett*, Deputy Assistant Attorney General, argued the cause for respondent in both cases. With them on the brief was *Arthur K. Bolton*, Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Once again we are confronted with the question of racial discrimination in the selection of the grand and petit juries which have respectively indicted petitioners and found them guilty of the offense of murder. The claim is that Georgia's system of jury selection resulted in the systematic exclusion of Negroes from both the grand and petit juries in that its law required jury commissioners to select the names of prospective jurors from the books of the county tax receiver which were maintained on a racially segregated basis. Ga. Code Ann. § 59–106. The grand jury question is raised in both these cases and we consolidated them for argument and do likewise on disposition.

No. 253 is an interlocutory appeal from a judgment denying petitioners' claim as to the grand jury which in-

dicted them. Georgia law authorizes such an appeal, Ga. Code Ann. § 6–701, and it was first perfected to the Supreme Court of Georgia which transferred it to the Georgia Court of Appeals. That court affirmed the denial of the claim of discrimination. 112 Ga. App. 328, 145 S. E. 2d 83. We granted certiorari. 384 U. S. 1000 (1966). In view of the lack of finality of the order in this case, we dismiss the writ in No. 253 as improvidently granted and proceed to dispose of both the grand and petit juries questions in No. 650.

Following affirmance by the Georgia Court of Appeals of the interlocutory appeal, the trial court proceeded to try petitioners' cases on the merits. After a challenge to the array of petit jurors was denied, petitioners were put to trial and were convicted. The Supreme Court of Georgia affirmed. *Whitus* v. *State,* 222 Ga. 103, 149 S. E. 2d 130; *Davis* v. *State,* 222 Ga. 114, 149 S. E. 2d 130. We granted certiorari. *Post,* p. 813. We find that the circumstances here, unexplained by the State, are sufficient to support petitioners' claims of discrimination and reverse the judgments.

I.

The petitioners have been here twice before. They were originally convicted in 1960 and the Supreme Court of Georgia affirmed. *Davis* v. *State,* 216 Ga. 110, 114 S. E. 2d 877; *Whitus* v. *State,* 216 Ga. 284, 116 S. E. 2d 205, cert. denied, 365 U. S. 831 (1961). Thereafter a writ of habeas corpus was filed in the United States District Court for the Southern District of Georgia in which, for the first time, petitioner Whitus attacked the composition of the grand and petit juries. The District Court dismissed the writ and the Court of Appeals affirmed. 299 F. 2d 844. On writ of certiorari, we vacated that judgment and remanded the case to the District Court for a hearing on the claim of discrimination.

Whitus v. *Balkcom*, 370 U. S. 728 (1962). On remand, the District Court again dismissed the petition on the ground that the claim had been waived since it was not raised in the Georgia courts. The Court of Appeals reversed, holding that Negroes had been systematically excluded from both the grand and petit juries. *Whitus* v. *Balkcom*, 333 F. 2d 496. Its ruling was based on a finding that 45% of the population of the county was Negro; yet, none had ever served on juries within the memory of the witnesses.

II.

After the Court of Appeals set aside the first convictions, *Whitus* v. *Balkcom*, *ibid.*, the Superior Court of Mitchell County directed the jury commissioners for the county to revise the jury list. Georgia law requires that the six commissioners appointed by the Superior Court "select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets." Ga. Code Ann. § 59–106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting those selected as grand jurors, constitutes the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code Ann. §§ 59–108, 59–109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected.

The State admits that prior to 1965, the tax return sheets furnished by the State Revenue Department, Ga. Code Ann. § 92–6302, were white for white taxpayers and yellow for Negro taxpayers. The 1964 tax digest, and all digests prior to 1964, were made up from these segregated

tax returns. Furthermore, the jury lists for each county are required by law to be made up from the tax digest. Ga. Code Ann. § 59–106. The State further admits that the "revised" jury list from which both the grand and petit juries serving in these cases were selected, had been made up by reference to the old jury list, which the Court of Appeals had condemned, and the 1964 tax digest, which had been prepared from the white and yellow tax return sheets of that year. However, the jury commissioners did not use the 1964 tax returns themselves, nor the 1965 tax digest which had not yet been made up. The tax digest appears to have been in one volume but was segregated into two sections—one for white and the other for Negro taxpayers. The Negroes whose names were included in the tax digest were designated by a "(c)" being placed opposite their names as required by Ga. Code Ann. § 92–6307.

The three jury commissioners who appeared as witnesses testified that they were not aware of the letter (c) appearing after the names of the Negroes on the 1964 tax digest; that they never included or excluded anyone on the "revised" jury list because of race or color; that they placed on the "revised" jury list those persons whom they knew personally from their respective communities; that there were around 600 selected; and that the "revised" list, which the commissioners themselves prepared, had no designation of race upon it.

III.

For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U. S. C. § 243, and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason

of their race. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); see also *Pierre* v. *Louisiana*, 306 U. S. 354 (1939). There is no controversy as to the constitutional principle—the question involved is its application to the facts disclosed in this record. It is our province to "analyze the facts in order that the appropriate enforcement of the federal right may be assured," *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935), and while the conclusions reached by the highest court of the State "are entitled to great respect . . . it becomes our solemn duty to make independent inquiry and determination of the disputed facts . . . ." *Pierre* v. *Louisiana*, *supra*, at 358. The burden is, of course, on the petitioners to prove the existence of purposeful discrimination, *Tarrance* v. *Florida*, 188 U. S. 519 (1903). However, once a prima facie case is made out the burden shifts to the prosecution.

It is undisputed that the "revised" jury list was made up from the 1964 tax digest, the old jury list and the personal acquaintance of the commissioners with persons in their respective communities. It is admitted that the old jury list had been condemned as illegal by the Court of Appeals when it reversed petitioners' first convictions. It is conceded that 27.1% of the taxpayers in the county are Negroes; that the county had a population in 1960 of 10,206 people over the age of 21 years, of whom 4,706 were male,[1] with 2,004, or 42.6%, of this latter number being Negroes; that 33 prospective jurors were drawn for grand jury service for the term of court during which petitioners were indicted, three being Negroes, of whom one actually served on the grand jury of 19 persons; that a venire of 90 persons was used for the selection of the petit jury which tried petitioners, of which number at least seven were Negroes; and, that no Negro was accepted on the petit jury.

[1] Women, while qualified to serve, are not compelled to serve and may be excused upon request. Ga. Code Ann. § 59–124.

Furthermore, it is obvious that the 1964 tax digest was required to be made under the same segregated system as were the previous digests, and suffered the same deficiency. Indeed, the State employed the same procedure which it concedes resulted in discrimination in the petitioners' first trial.

We believe that this proof constituted a prima facie case of purposeful discrimination. While the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome the prima facie case. *Norris* v. *Alabama, supra,* at 598. The State also insists that the revision of the jury list made evidence of the former practice of exclusion irrelevant. However, as we have seen, this revision was suspect. At the least it was based on the old jury roll which had been specifically condemned by the Court of Appeals and the 1964 tax digest which was suspect because of the system by which it was required to be prepared. The Court of Appeals condemned this same system in reversing the original convictions.

We believe that the circumstances here are akin to those condemned in *Avery* v. *Georgia,* 345 U. S. 559 (1953). There the names of the prospective Negro jurors were placed in the jury box on yellow colored tickets. Here the commissioners used the old jury roll which had been condemned by the Court of Appeals and the 1964 tax digest which was required by law to be, and was, maintained on a racially segregated basis. Moreover, it was prepared from the tax returns of Negroes which, at the time, were required to be filed on yellow sheets of paper while the returns of white persons were on white sheets. It is this old "system of selection" condemned by the Court of Appeals "and the resulting danger of abuse which was struck down in *Avery* . . . ." *Williams* v. *Georgia,* 349 U. S. 375, 382 (1955). Nor

does the fact that the commissioners selected prospective jurors on the basis of personal acquaintance correct the evil. See *Cassell* v. *Texas*, 339 U. S. 282, 289 (1950).

Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion.[2] Although the system of selection used here had been specifically condemned by the Court of Appeals, the State offered no testimony as to why it was continued on retrial. The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires, although the digest must have included the names of large numbers of "upright and intelligent" Negroes as the statutory qualification required. In any event the State failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners' prima facie case.

It is contended by petitioners that in the event of a reversal of the decision below they should be set free rather than retried. This contention arises from language

[2] While unnecessary to our disposition of the instant case, it is interesting to note the "probability" involved in the situation before the Court.

The record does not indicate how many Negroes were actually on the "revised" jury list of approximately 600 names. One jury commissioner, however, said his best estimate was 25% to 30%, which is in close proximity to the 27.1% who were admittedly on the tax digest for 1964. Assuming that 27% of the list was made up of the names of qualified Negroes, the mathematical probability of having seven Negroes on a venire of 90 is .000006. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

used by the Court of Appeals in reversing the original convictions. The court expressed its "present opinion that a period of eight months . . . will be sufficient to afford the State an opportunity to take the necessary steps to reindict and retry the petitioners." *Whitus* v. *Balkcom,* 333 F. 2d, at 510. The theory is that a constitutional procedure was not provided within the eight-month period and that a remand for a new trial would be beyond that period. We are not persuaded by this logic. The proper disposition where a state court conviction is set aside on the ground of jury discrimination is stated in *Hill* v. *Texas,* 316 U. S. 400, 406 (1942):

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."

See also *Patton* v. *Mississippi,* 332 U. S. 463, 469 (1947); *Eubanks* v. *Louisiana,* 356 U. S. 584, 589 (1958).

The judgments are, therefore, reversed for further proceedings not inconsistent with this opinion.

It is so ordered.

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SPENCER *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 68. Argued October 17–18, 1966.—Decided January 23, 1967.*

Petitioners, who were convicted of felonies in Texas courts, challenge the then-existing procedure under Texas' recidivist or habitual-criminal statutes, whereby, through allegations in the indictment and the introduction of proof concerning a defendant's past convictions, the jury trying the pending criminal charge was fully informed of such past convictions for sentencing purposes, but was also charged by the court that such matters were not to be taken into account in assessing the defendant's guilt or innocence under the current indictment. Petitioners claim that this procedure violates the Due Process Clause of the Fourteenth Amendment. *Held:* Texas' use of prior convictions in the petitioners' current criminal trials did not offend the provisions of the Due Process Clause of the Fourteenth Amendment. Pp. 559–569.

(a) The recidivist statutes are not unconstitutional. Pp. 559–560.

(b) The States have wide leeway in dividing responsibility between judge and jury in criminal cases, and it is not unconstitutional for the jury to assess the punishment in a criminal case, or to make findings as to a prior conviction even though enhanced punishment is left to be imposed by the judge. P. 560.

(c) As in other instances where evidence of prior convictions has traditionally been admitted to serve a specific purpose, the possibility of prejudice here is outweighed by the validity of the State's purpose in permitting introduction of the evidence. Pp. 560–561.

(d) The defendants' interests were protected by limiting instructions, and by the discretion of the trial judge to limit or forbid admission of particularly prejudicial evidence. P. 561.

(e) Enforcement of recidivist statutes in a one-stage trial serves a valid state purpose. P. 563.

(f) Neither the specific provisions of the Constitution nor cases decided under the Due Process Clause establish this Court as a

*Together with No. 69, *Bell* v. *Texas*, on certiorari to the Court of Criminal Appeals of Texas, argued October 17, 1966, and No. 70, *Reed* v. *Beto, Corrections Director*, on certiorari to the United States Court of Appeals for the Fifth Circuit, argued October 18, 1966.

rule-making organ for the promulgation of state rules of criminal procedure. *Jackson* v. *Denno*, 378 U. S. 368, distinguished. Pp. 564–565.

(g) The States have power to promulgate their own rules of evidence to try their state-created crimes in their own courts, as long as their rules are not prohibited by the Federal Constitution, which these rules are not. Pp. 568–569.

No. 68, appeal dismissed and certiorari granted; 389 S. W. 2d 304, affirmed; No. 69, 387 S. W. 2d 411, No. 70, 343 F. 2d 723, affirmed.

Michael D. Matheny, by appointment of the Court, *post*, p. 896, argued the cause for appellant in No. 68. With him on the brief was *Joe B. Goodwin*. *Tom R. Scott* argued the cause and filed briefs for petitioner in No. 69. *Emmett Colvin, Jr.*, argued the cause for petitioner in No. 70. With him on the brief were *Charles W. Tessmer* and *Clyde W. Woody*.

Leon Douglas argued the cause for appellee in No. 68. With him on the brief were *Waggoner Carr*, Attorney General of Texas, and *Hawthorne Phillips*, First Assistant Attorney General. *Mr. Phillips* argued the cause for respondent in No. 69. With him on the briefs were *Mr. Carr*, *T. B. Wright*, Executive Assistant Attorney General, and *Lonny F. Zwiener*, *Gilbert J. Pena* and *Howard M. Fender*, Assistant Attorneys General. *Mr. Fender* argued the cause for respondent in No. 70. With him on the brief were *Messrs. Carr, Phillips, Wright, Pena* and *Zwiener*.

T. W. Bruton, Attorney General, *pro se*, and *Ralph Moody*, Deputy Attorney General, filed a brief for the Attorney General of North Carolina, as *amicus curiae*, in No. 69.

Mr. Justice Harlan delivered the opinion of the Court.

Texas, reflecting widely established policies in the criminal law of this country, has long had on its books

so-called recidivist or habitual-criminal statutes. Their effect is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. The three cases at hand challenge the procedures employed by Texas in the enforcement of such statutes.[1]

Until recently, and at the time of the convictions before us, the essence of those procedures was that, through allegations in the indictment and the introduction of proof respecting a defendant's past convictions, the jury trying the pending criminal charge was fully informed of such previous derelictions, but was also charged by the court that such matters were not to be taken into account in assessing the defendant's guilt or innocence under the current indictment.[2]

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[1] The recidivist statutes here involved are Articles 62, 63, and 64 of the Texas Pen. Code (1952).

Article 62 provides: "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 63 provides: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Article 64 provides: "A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

[2] These procedures were embodied in Texas Code Crim. Proc. Art. 642 (1941), providing as follows: "A jury being impaneled in any criminal action, the cause shall proceed in the following order: 1. The indictment or information shall be read to the jury by the attorney prosecuting. . . . 4. The testimony on the part of the State shall be offered." By judicial gloss it appears that, at least in noncapital cases, a defendant by stipulating his prior convictions could keep knowledge of them away from the jury. See *Pitcock* v. *State*, 367 S. W. 2d 864. But see the decision below in *Spencer*, 389 S. W. 2d 304, for the inapplicability of the stipulation rule in

The facts in the cases now here are these. In *Spencer* (No. 68), the petitioner [3] was indicted for murder, with malice, of his common-law wife. The indictment alleged that the defendant had previously been convicted of murder with malice, a factor which if proved would entitle the jury to sentence the defendant to death or to prison for not less than life under Texas Pen. Code Art. 64, n. 1, *supra,* whereas if the prior conviction was not proved the jury could fix the penalty at death or a prison term of not less than two years, see Texas Pen. Code Art. 1257. Spencer made timely objections to the reading to the jury of that portion of the indictment, and objected as well to the introduction of evidence to show his prior conviction. The jury was charged that if it found that Spencer had maliciously killed the victim, and that he had previously been convicted of murder with malice, the jury was to "assess his punishment at death or confinement in the penitentiary for life." The jury was in-

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capital cases. In the view we take of the constitutional issue before us we consider it immaterial whether or not that course was open to any of the petitioners. Subsequent to the present convictions Texas has passed a new law respecting the procedure governing recidivist cases, the effect of which seems to be that except in capital cases the jury is not given the recidivist issue until it has first found the defendant guilty under the principal charge. Texas Code Crim. Proc. Art. 36.01, effective January 1, 1966. Since these cases were all tried under the older procedure, the new statute is not before us.

[3] The question of whether *Spencer* is properly here as an appeal, a matter which we postponed to consideration of the merits, is a tangled one. See *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; Hart & Wechsler, The Federal Courts and the Federal System 565–567 (1953). Rather than undertake to resolve it, we think it more profitable to dismiss this appeal, treat it as a petition for certiorari, 28 U. S. C. § 2103, and grant the petition, particularly as there is pending in the Court Spencer's timely filed alternative petition for certiorari, which has been held to await the outcome of this appeal. Accordingly we have in this opinion referred to Spencer as a "petitioner."

structed as well that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried. Spencer was found guilty and sentenced to death.

In *Bell* (No. 69), the petitioner was indicted for robbery, and the indictment alleged that he had been previously convicted of bank robbery in the United States District Court for the Southern District of Texas. Bell moved to quash the indictment on the ground, similar to that in *Spencer*, that the allegation and reading to the jury of a prior offense was prejudicial and would deprive him of a fair trial. Similar objections were made to the offer of documentary evidence to prove the prior conviction. The court's charge to the jury stated that the prior conviction should not be considered in passing upon the issue of guilt or innocence on the primary charge. The sentencing procedure in this noncapital case was somewhat different from that in *Spencer*. The jury was instructed that if it found the defendant guilty only of the present robbery charge, it could fix his sentence at not less than five years nor more than life. See Texas Pen. Code Art. 1408. But if it found that Bell had also been previously convicted as alleged in the indictment, it should bring in a verdict of guilty of robbery by assault and a further finding that the allegations "charging a final conviction for the offense of bank robbery are true." The jury so found, and the judge fixed punishment, set by law for such a prior offender, at life imprisonment in the penitentiary. See Texas Pen. Code Art. 62, note 1, *supra*.

The *Reed* case (No. 70),[4] involving a third-offender

[4] The *Reed* case, unlike the *Spencer* and *Bell* cases which come to us from the Court of Criminal Appeals of Texas, is here from a judgment of the United States Court of Appeals for the Fifth Circuit affirming the District Court's dismissal of a writ of habeas corpus on the ground that the Texas recidivist procedure did not offend the United States Constitution. 343 F. 2d 723.

prosecution for burglary, see Texas Pen. Code Art. 63, n. 1, *supra,* entailed the same practice as followed in *Bell.*

The common and sole constitutional claim made in these cases is that Texas' use of prior convictions in the current criminal trial of each petitioner was so egregiously unfair upon the issue of guilt or innocence as to offend the provisions of the Fourteenth Amendment that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." We took these cases for review, 382 U. S. 1022, 1023, 1025, because the courts of appeals have divided on the issue.[5] For reasons now to follow we affirm the judgments below.

The road to decision, it seems to us, is clearly indicated both by what the petitioners in these cases do *not* contend and by the course of the authorities in closely related fields. No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States,[6] and by the Federal Government as well. See, *e. g.,* 18 U. S. C. § 2114; Fed. Rule Crim. Proc.

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[5] The Third Circuit in *United States* v. *Banmiller,* 310 F. 2d 720, held a similar Pennsylvania procedure, when applied in capital cases, unconstitutional. The Fourth Circuit held a comparable Maryland recidivist practice unconstitutional in all cases. *Lane* v. *Warden,* 320 F. 2d 179. The Fifth Circuit in *Breen* v. *Beto,* 341 F. 2d 96, and again in the *Reed* case before us today, 343 F. 2d 723, and the Eighth Circuit in *Wolfe* v. *Nash,* 313 F. 2d 393, have held such procedures constitutional. The Ninth Circuit in *Powell* v. *United States,* 35 F. 2d 941, sustained the procedure in the context of a second offense under § 29 of the National Prohibition Act, 41 Stat. 316.

[6] See annotations at 58 A. L. R. 20, 82 A. L. R. 345, 79 A. L. R. 2d 826; Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1965).

32 (c)(2); D. C. Code § 22–104 (1961). Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; *Gryger* v. *Burke*, 334 U. S. 728; *Oyler* v. *Boles*, 368 U. S. 448.

Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases. *Hallinger* v. *Davis*, 146 U. S. 314; *Maxwell* v. *Dow*, 176 U. S. 581; cf. *Chandler* v. *Fretag*, 348 U. S. 3; *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 405, n. 8.

Petitioners do not even appear to be arguing that the Constitution is infringed if a jury is told of a defendant's prior crimes. The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, *Nye & Nissen* v. *United States*, 336 U. S. 613, *Ellisor* v. *State*, 162 Tex. Cr. R. 117, 282 S. W. 2d 393; an element in the crime, *Doyle* v. *State*, 59 Tex. Cr. R. 39, 126 S. W. 1131; identity, *Chavira* v. *State*, 167 Tex. Cr. R. 197, 319 S. W. 2d 115; malice, *Moss* v. *State*, 364 S. W. 2d 389; motive, *Moses* v. *State*, 168 Tex.

Cr. R. 409, 328 S. W. 2d 885; a system of criminal activity, *Haley* v. *State*, 87 Tex. Cr. R. 519, 223 S. W. 202; or when the defendant has raised the issue of his character, *Michelson* v. *United States*, 335 U. S. 469, *Perkins* v. *State*, 152 Tex. Cr. R. 321, 213 S. W. 2d 681; or when the defendant has testified and the State seeks to impeach his credibility, *Giacone* v. *State*, 124 Tex. Cr. R. 141, 62 S. W. 2d 986.[7]

Under Texas law the prior convictions of the defendants in the three cases before the Court today might have been admissible for any one or more of these universally accepted reasons. In all these situations, as under the recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendants' interests are protected by limiting instructions, see *Giacone* v. *State*, *supra*, and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence. See *Spears* v. *State*, 153 Tex. Cr. R.

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[7] These Texas cases reflect the rules prevailing in nearly all common-law jurisdictions. See generally McCormick, Evidence §§ 157–158 (1954); 1 Wharton's Criminal Evidence §§ 221–243 (Anderson ed. 1955); 1 Wigmore, Evidence §§ 215–218 (3d ed. 1940 and 1964 Supp.); Note, Other Crimes Evidence at Trial, 70 Yale L. J. 763 (1961). For the English rules, substantially similar, see Cross, Evidence 292–333 (2d ed. 1963). Recent commentators have criticized the rule of general exclusion, and have suggested a broader range of admissibility. Model Code of Evidence, Rule 311; Carter, The Admissibility of Evidence of Similar Facts, 69 L. Q. Rev. 80 (1953), 70 L. Q. Rev. 214 (1954); Note, Procedural Protections of the Criminal Defendant, 78 Harv. L. Rev. 426, 435–451 (1964). For the use of this type of evidence in continental jurisdictions, see Glanville Williams, The Proof of Guilt 181 (2d ed. 1958); 1 Wigmore, *supra*, § 193.

14, 216 S. W. 2d 812; 1 Wigmore, Evidence § 29a (3d ed. 1940); Uniform Rule of Evidence 45; Model Code of Evidence, Rule 303.

This general survey sufficiently indicates that the law of evidence, which has been chiefly developed by the States, has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes. The evidence itself is usually, and in recidivist cases almost always, of a documentary kind, and in the cases before us there is no claim that its presentation was in any way inflammatory. Compare *Marshall* v. *United States*, 360 U. S. 310. To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. See *Delli Paoli* v. *United States*, 352 U. S. 232; cf. *Opper* v. *United States*, 348 U. S. 84; *Krulewitch* v. *United States*, 336 U. S. 440. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

Such an approach was in fact taken by the Court in *Michelson* v. *United States,* 335 U. S. 469. There, in a federal prosecution, the Government was permitted to cross-examine defense witnesses as to the defendant's character and to question them about a prior conviction. The Court, recognizing the prejudicial effect of this evidence, noted that "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects," *id.,* at 485, and held that this Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-standing practice at issue. *A fortiori,* this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff* v. *Schnackenberg,* 384 U. S. 373, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts. It is noteworthy that nowhere in *Michelson* did the Court or dissenting opinions approach the issue in constitutional terms.

It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual-offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result.

Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental

elements of fairness in a criminal trial. See, *e. g.*, *Tumey* v. *Ohio*, 273 U. S. 510; *Betts* v. *Brady*, 316 U. S. 455; cf. *Gideon* v. *Wainwright*, 372 U. S. 335; see *Estes* v. *Texas*, 381 U. S. 532; *Sheppard* v. *Maxwell*, 384 U. S. 333; cf. *Griffin* v. *Illinois*, 351 U. S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. See also *Buchalter* v. *New York*, 319 U. S. 427.

Petitioners' reliance on *Jackson* v. *Denno*, 378 U. S. 368, is misplaced. There the Court held unconstitutional the New York procedure leaving to the trial jury alone the issue of the voluntariness of a challenged confession, an area of law that has been characterized by the development of particularly stiff constitutional rules. See *Rogers* v. *Richmond*, 365 U. S. 534; *Miranda* v. *Arizona*, 384 U. S. 436. The Court held that a judicial ruling was first required to determine whether as a matter of law—federal constitutional law—the confession could be deemed voluntary. This requirement of a threshold hearing before a judge on the federal question of voluntariness lends no solid support to the argument made here—that a two-stage jury trial is required when-

ever a State seeks to invoke an habitual-offender statute. It is true that the Court in *Jackson* supported its holding by reasoning that a general jury verdict was not a "reliable" vehicle for determining the issue of voluntariness because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury. In the procedures before us, in contrast, no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take *Jackson* as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose. Compare *Opper* v. *United States*, 348 U. S. 84; *Leland* v. *Oregon*, 343 U. S. 790.[8]

It is fair to say that neither the *Jackson* case nor any other due process decision of this Court even remotely supports the proposition that the States are not free to enact habitual-offender statutes of the type Texas

[8] Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior-crime evidence is admitted as to credibility. Kalven & Zeisel, The American Jury (1966). The study contrasts the effect of such evidence on judges and juries and concludes that "Neither the one nor the other can be said to be distinctively gullible or skeptical." *Id.*, at 180.

has chosen and to admit evidence during trial tending to prove allegations required under the statutory scheme.

Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here. The rate of recidivism is acknowledged to be high,[9] a wide variety of methods of dealing with the problem exists, and experimentation is in progress. The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, which requires allegations and proof of past convictions in the current trial, is, of course, the simplest and best known procedure.[10] Some jurisdictions deal with the recidivist issue in a totally separate proceeding, see, *e. g., Oyler* v. *Boles*, 368 U. S. 448, and as already observed (n. 2, *supra*) Texas to some extent has recently changed to that course. In some States such a proceeding can be instituted even after conviction on the new substantive offense, see Ore. Rev. Stat. § 168.040 (1959); *Graham* v. *West Virginia*, 224 U. S. 616. The method for determining prior convictions varies also between jurisdictions affording a jury trial on this issue, *e. g.*, Fla. Stat. Ann. § 775.11 (1965); and those leaving that question to the court, see, *e. g.*, Fed. Rule Crim. Proc. 32 (a); Mo. Rev. Stat. § 556.280 (2) (1959).[11] Another procedure,

[9] See "Careers in Crime," a statistical survey collected in Uniform Crime Reports for the United States—1965, p. 27 (Dept. of Justice, 1966). The Statistical Abstract of the United States, 1966, reveals that 62% of prisoners committed to federal prisons in the year ending June 30, 1965, had been previously committed. *Id.*, at 163.

[10] For a survey and analysis of the various recidivist procedures, see Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1965); see also Note, The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions, 33 N. Y. U. L. Rev. 210 (1958).

[11] Texas juries have had authority to impose punishment since 1846, but in all but 11 States this power is held by the judge. See Reid, The Texas Code of Criminal Procedure, 44 Tex. L. Rev. 983, 1008–1009 (1966).

used in Great Britain and Connecticut, see Coinage Offences Act, 1861, 24 & 25 Vict., c. 99; *State* v. *Ferrone*, 96 Conn. 160, 113 A. 452, requires that the indictment allege both the substantive crime and the prior conviction, that both parts be read to the defendant prior to trial, but that only the allegations relating to the substantive crime be read to the jury. If the defendant is convicted, the prior-offense elements are then read to the jury which considers any factual issues raised. Yet another system relies upon the parole authorities to withhold parole in accordance with their findings as to prior convictions. See, *e. g.*, N. J. Stat. Ann. § 30:4–123.12 (1964). And within each broad approach described, other variations occur.

A determination of the "best" recidivist trial procedure necessarily involves a consideration of a wide variety of criteria, such as which method provides most adequate notice to the defendant and an opportunity to challenge the accuracy and validity of the alleged prior convictions, which method best meets the particular jurisdiction's allocation of responsibility between court and jury, which method is best accommodated to the State's established trial procedures, and of course which method is apt to be the least prejudicial in terms of the effect of prior-crime evidence on the ultimate issue of guilt or innocence. To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested,[12] and with which we might well agree were the

[12] See, *e. g.*, *Lane* v. *Warden*, 320 F. 2d 179; Note, 40 N. Y. U. L. Rev. 332, 348 (1965). Other commentators have cautioned against a too hasty adoption of the two-stage trial. See the Second Circuit decision in *United States* v. *Curry*, 358 F. 2d 904, 914–915, where the court discussed the procedure as it applied in federal capital cases, and concluded: "Given the many considerations which may affect the necessity for a two-stage trial in each case, and considering the

matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.[13] With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court

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questionable desirability of this untested technique, we think it best to leave this question to the discretion of the trial court." See also the discussion of the practical and administrative disadvantages of such a procedure in *Frady* v. *United States*, 121 U. S. App. D. C. 78, 108–109, 348 F. 2d 84, 114–115 (dissenting opinion). We have been presented with no positive information concerning actual experience with a separate penalty procedure that would bear on a decision to impose it upon all the States as a matter of constitutional law. One study suggests that as a practical matter such a procedure has not proved helpful to defendants: "The California experience, dating back to 1957, has rather been that defense counsel have often neglected to prepare adequately for the penalty phase and have exhibited a lack of sophistication concerning what facts should be advanced as mitigating. Apparently, the approach of defense lawyers has been to devote the bulk of their efforts to the substantive issue of guilt and to relegate the penalty phase to a minor role. On the other hand, the prosecution has taken complete advantage of the penalty phase and has attempted to marshal and to present to the jury all of the aggravating circumstances that exist." Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 167 (1964).

[13] In cases where, as in *Spencer*, a jury itself fixes the penalty, the effect of the emphasis in THE CHIEF JUSTICE's separate opinion upon the use of a stipulation would in reality be to require, as a matter of federal constitutional law, a two-stage jury trial. For a stipulation no less than evidentiary proof would bring the fact of prior convictions before the trial jury.

upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not. The judgments in these cases are

Affirmed.

MR. JUSTICE STEWART, concurring.

If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States [1]—and by Texas herself since January 1 of last year [2]—are far superior to those utilized in the cases now before us. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in these recidivist cases. The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE FORTAS concurs, dissenting in Nos. 68 and 69, and concurring in No. 70.

It seems to me that the only argument made by the Court which might support its disposition of these cases is the amorphous one that this Court should proceed hesitantly in dealing with courtroom procedures which are alleged to violate the Due Process Clause of the Fourteenth Amendment. It attempts to bolster its decision with arguments about the conceded validity of the purpose of recidivist statutes and by pointing to occa-

[1] See opinion of THE CHIEF JUSTICE, *post*, at 586, n. 11.

[2] See opinion of the Court, *ante*, at 556, n. 2.

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sions when evidence of prior crimes is traditionally admitted to serve a specific purpose related to finding guilt or innocence. For the reasons which I shall discuss, I do not find in these two arguments support for the decision. Nor am I persuaded by its cautious attitude toward this procedure. I recognize that the criteria for decision in procedural due process cases are necessarily drawn from the traditional jurisprudential attitudes of our legal system rather than from a relatively specific constitutional command. However, this Court has long recognized the central importance of courtroom procedures in maintaining our constitutional liberties. As Mr. Justice Frankfurter often reminded us, the history of individual liberty is largely coincident with the history of observance of procedural safeguards, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, concurring opinion of Frankfurter, J., at 164.

It seems to me that the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process, not because this procedure is not the nicest resolution of conflicting but legitimate interests of the State and the accused, but because it needlessly prejudices the accused without advancing any legitimate interest of the State. If I am wrong in thinking that the introduction of prior-convictions evidence serves no valid purpose I am not alone, for the Court never states what interest of the State is advanced by this procedure. And this failure, in my view, undermines the logic of the Court's opinion.

There is much said about the valid purpose of enhanced punishment for repeating offenders, with which I agree, and about the variety of occasions in criminal trials in which prior-crimes evidence is admitted as having some relevance to the question of guilt or innocence. But I cannot find support for this procedure in either the purposes of recidivist statutes or by analogy to the

traditional occasions where prior-crimes evidence is admitted. And the Court never faces up to the problem of trying to justify this recidivist procedure on the ground that the State would not violate due process if it used prior convictions simply as evidence of guilt because it showed criminal propensity.

Recidivist statutes have never been thought to allow the State to show probability of guilt because of prior convictions. Their justification is only that a defendant's prior crimes should lead to enhanced punishment for any subsequent offenses. Recidivist statutes embody four traditional rationales for imposing penal sanctions.[1] A man's prior crimes are thought to aggravate his guilt for subsequent crimes, and thus greater than usual retribution is warranted. Similarly, the policies of insulating society from persons whose past conduct indicates their propensity to criminal behavior, of providing deterrence from future crime, and of rehabilitating criminals are all theoretically served by enhanced punishment according to recidivist statutes. None of these four traditional justifications for recidivist statutes is related in any way to the burden of proof to which the State is put to prove that a crime has currently been committed by the alleged recidivist. The fact of prior convictions is not intended by recidivist statutes to make it any easier for the State to prove the commission of a subsequent crime. The State does not argue in these cases that its statutes are, or constitutionally could be, intended to allow the prosecutor to introduce prior convictions to show the accused's criminal disposition. But the Court's opinion seems to accept, without discussion, that this use of prior-crimes evidence would be consistent with due process.

The amended Texas procedure is the nearest demonstration that none of the interests served by recidivist

[1] See generally Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332 (1965).

statutes is advanced by presentation of prior-crimes evidence before the defendant has been found guilty. Under current statutory law,[2] effective since January 1, 1966, and therefore not involved in these cases, in felony cases the jury first decides the question of guilt or innocence of the crime currently charged, and only after the defendant is found guilty of the current crime is evidence presented on the entirely separate question of whether the defendant has been previously convicted of a crime which places him within the scope of a recidivist statute requiring enhanced punishment. Under the old Texas procedure involved in these cases, just as under the new procedure, the fact of prior convictions is relevant only to the question of enhanced punishment. Recidivist statutes have nothing whatever to do with the method by which the State shows that an accused has committed a crime.

Whether or not a State has recidivist statutes on its books, it is well established that evidence of prior convictions may not be used by the State to show that the accused has a criminal disposition and that the probability that he committed the crime currently charged is increased.[3] While this Court has never held

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[2] Texas Code Crim. Proc. Art. 36.01, effective January 1, 1966. The new two-stage procedure does not apply in capital cases, the reason for the distinction apparently being because in capital cases the jury has a choice of punishment under the applicable recidivist statute. The validity of this distinction will be discussed below.

[3] Professor McCormick states:

"The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." McCormick, Evidence § 157 (1954 ed.).

Dean Wigmore agrees with this statement of the general rule of exclusion, 1 Wigmore, Evidence §§ 193–194 (3d ed. 1940). As Wigmore points out, evidence of prior crimes is objectionable, not because it is not somewhat probative, but because the jury is likely to

that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts,[4] as well as decisions by courts of

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give it more weight than it deserves and might decide that the defendant deserves to be punished because of the past crime without regard to whether he is guilty of the crime currently charged.

[4] See, *e. g.*, *Marshall* v. *United States*, 360 U. S. 310 (1959); *Michelson* v. *United States*, 335 U. S. 469 (1948); *Boyd* v. *United States*, 142 U. S. 450 (1892).

In *Michelson*, the Court stated:

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States*, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." 335 U. S., at 475–476.

In *Marshall*, the Court reversed a conviction where it was shown that newspaper accounts of the defendant's prior convictions had been seen by a substantial number of jurors. The Court stated:

". . . We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence." 360 U. S., at 312–313.

In *Boyd*, the defendants were charged with murder following an attempt to rob, and the prosecution introduced evidence that the defendants had committed other robberies before the one involved

appeals [5] and of state courts,[6] suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.

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in the crime charged. The Court, in an opinion by the first Mr. Justice Harlan, held the evidence of other crimes inadmissible:

". . . Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death." 142 U. S., at 458.

[5] See, *e. g.*, *Lovely* v. *United States*, 169 F. 2d 386, 389 (C. A. 4th Cir. 1948):

"The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial."

Railton v. *United States*, 127 F. 2d 691, 693 (C. A. 5th Cir. 1942):

". . . It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged."

Cf. also *Tedesco* v. *United States*, 118 F. 2d 737 (C. A. 9th Cir. 1941); *Swann* v. *United States*, 195 F. 2d 689 (C. A. 4th Cir. 1952); *United States* v. *Jacangelo*, 281 F. 2d 574 (C. A. 3d Cir. 1960).

[6] Texas recognizes this general rule, *Seay* v. *State*, 395 S. W. 2d 40. Other typical decisions are *People* v. *Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901); *State* v. *Scott*, 111 Utah 9, 175 P. 2d 1016 (1947). See also *State* v. *Myrick*, 181 Kan. 1056, 317 P. 2d 485 (1957); *Scarbrough* v. *State*, 204 Miss. 487, 37 So. 2d 748 (1948).

Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States,* 336 U. S. 440, 453 (concurring opinion) (1949). *United States* v. *Banmiller,* 310 F. 2d 720, 725 (C. A. 3d Cir. 1962). Mr. Justice Jackson's assessment has received support from the most ambitious empirical study of jury behavior that has been attempted, see Kalven & Zeisel, The American Jury 127–130, 177–180.

Recognition of the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.

As I have stated, I do not understand the opinion to assert that this Court would find consistent with due process the admission of prior-crimes evidence for no

purpose other than what probative value it has bearing on an accused's disposition to commit a crime currently charged. It ignores this issue, and points out that evidence of prior crimes in other contexts has not been thought so prejudicial that it cannot be admitted to serve a particular valid purpose. Thus, past crimes may be used to show a common design between a past crime and one currently charged, to show the distinctive handiwork of the defendant, or to show that the act presently at issue was probably not unintentional.[7] We need not disagree with the admission of evidence of prior convictions in cases such as these, because past convictions are directly relevant to the question of guilt or innocence of the crime currently charged. It is admitted because its probative value, going to elements of the current charges, is so strong that it outweighs the prejudice inherent in evidence of prior crimes. Also, as the Court further points out, evidence of prior crimes has traditionally been admitted to either impeach the defendant's credibility when he testifies in his own behalf, or to counteract evidence introduced by the defendant as to his good character. In each of these situations, the possibility of prejudice resulting from the evidence of prior convictions is thought to be outweighed by the legitimate purposes served by the evidence. When a defendant attempts to convince the jury of his innocence by showing it that he is a person of such character that it is unlikely that he committed the crime charged, the State has a legitimate interest in counteracting this evidence of good character by showing that the accused has been previously convicted. The defendant has initiated the inquiry into his reputation, and the State should be allowed to respond to this general character evidence as best it can.

[7] See generally exceptions set out in McCormick, Evidence § 157.

Similarly, when prior convictions are introduced to impeach the credibility of a defendant who testifies, a specific purpose is thought to be served. The theory is that the State should be permitted to show that the defendant-witness' credibility is qualified by his past record of delinquent behavior. In other words, the defendant is put to the same credibility test as any other witness. A defendant has some control over the State's opportunity to introduce this evidence in that he may decide whether or not to take the stand. Moreover, the jury hears of the prior convictions following a defendant's testimony, and it may be thought that this trial context combined with the usual limiting instruction results in the jury's actually behaving in accordance with the theory of limiting instructions: that is, that the prior convictions are only taken into account in assessing the defendant's credibility.

Although the theory justifying admission of evidence of prior convictions to impeach a defendant's credibility has been criticized,[8] all that is necessary for purposes of deciding this case is to accept its theoretical justification and to note the basic difference between it and the Texas recidivist procedure. In the case of impeachment, as in all the examples cited by the Court, the prior convictions are considered probative for a limited purpose which is relevant to the jury's finding of guilt or innocence. This purpose is, of course, completely different from the purpose for which prior convictions are admitted in recidivist cases, where there is no connection between the evidence and guilt or innocence.

In all the situations pointed out by the Court, the admission of prior-crimes evidence rests on a conclusion that the probative value of the evidence outweighs the

[8] See, *e. g.*, Note, Other Crimes Evidence at Trial: of Balancing and Other Matters, 70 Yale L. J. 763 (1961).

conceded possibility of prejudice. There is no middle position between the alternatives of admission or exclusion because, if the evidence is to serve the purpose for which it is considered probative, it must be admitted before the jury decides whether the defendant is guilty or innocent. The problem thus becomes the delicate one of balancing probative value against the possibility of prejudice, and the result for most state and federal courts (including this Court in the exercise of its supervisory power over proceedings in federal courts) has been that the trial judge is given discretion to draw the balance in the context of the trial. In view of this uniform tradition, it is apparent that prior-convictions evidence introduced for certain specific purposes relating to the determination of guilt or innocence, other than to show a general criminal disposition, would not violate the Due Process Clause.

From these situations where the probative value of prior convictions evidence is thought to outweigh its prejudicial impact, the Court draws the legitimate conclusion that prior-convictions evidence is not so inherently prejudicial that its admission is invariably prohibited. It combines this premise with the concededly valid purpose of recidivist statutes to produce the following logic: since prior-crimes evidence may be admitted at the guilt phase of a trial where the admission serves a valid purpose and since the purpose of recidivist statutes is valid, prior crimes may be proven in the course of the guilt phase of a trial in order that the jury may also assess whether a defendant, if found guilty, should be sentenced to an enhanced punishment under recidivist statutes. I believe this syllogism is plausible only on the surface, because the Court's premises do not combine to justify its far-reaching result. I believe the Court has fallen into the logical fallacy sometimes known as the fallacy of the undistributed middle, because it has failed to examine the

supposedly shared principle between admission of prior crimes related to guilt and admission in connection with recidivist statutes.[9] That the admission in both situations may serve a valid purpose does not demonstrate that the former practice justifies the latter any more than the fact that men and dogs are animals means that men and dogs are the same in all respects.

Unlike the purpose for the admission of prior-convictions evidence in all the examples cited by the Court, the admission in connection with enhancing punishment for repeating offenders has nothing whatever to do with the question of guilt or innocence of the crime currently charged. Because of the complete irrelevance of prior convictions to the question of guilt or innocence, the recidivist situation is not one where the trial courts are called upon to balance the probative value of prior convictions against their prejudicial impact. The purpose of admitting prior-convictions evidence should be served and prejudice completely avoided by the simple expedient of a procedure which reflects the exclusive relevance of recidivist statutes to the issue of proper punishment. Only after a defendant has been found guilty does the question of whether he fits the recidivist category become relevant to the sentence, and any issue of fact as to his prior convictions should then be decided by the jury.

The availability of this procedural alternative, through which the interests of the State as reflected in its recidivist statutes can be fully effectuated while prejudice to the defendant is avoided, means that the only interest the State may offset against the possibility of prejudice to justify introducing evidence of prior crimes in these cases is the inconvenience which would result from postponing a determination that the defendant falls within a recidivist category until after the jury has found him guilty of the crime currently charged. However, for the

[9] See Stebbing, A Modern Introduction to Logic 88 (6th ed. 1948).

purpose of deciding these cases, it is not necessary to consider whether the State's convenience in not conducting a two-stage trial justifies the prejudice which ensues when prior convictions are presented to a jury before it has decided whether the defendant is guilty of the crime charged. For the fact is that Texas has not even this matter of convenience in the method used to find facts regarding prior convictions to balance against the prejudice which ensues from the admission of this prior-convictions evidence. In No. 68, *Spencer* v. *Texas*, the defendant offered to stipulate to the truth of that portion of the indictment which alleged that he had been previously convicted of a crime which put him within the scope of a recidivist statute. The prosecutor refused to accept this stipulation, and the Texas courts allowed proof of the prior conviction to be presented to the jury on the ground that, under the recidivist statute dealing with capital crimes, the jury has a choice between the death penalty and life imprisonment. The courts reasoned that the existence of the prior conviction was information which the jury would find relevant in determining sentence. Of course, the offered stipulation dispensed completely with the need for the State to have the fact of prior crimes found by the jury to determine whether a recidivist statute applied to the defendant. Instead, the State tries to justify the refusal to accept the stipulation on the ground that it was relevant to the jury's discretion in ordering the death penalty. But this rationale would justify letting the jury hear, before determining guilt or innocence, all kinds of evidence which might be relevant to sentencing but which has traditionally been considered extremely prejudicial if admitted during the guilt phase of a trial. Thus, this argument would justify admitting probation reports, all kinds of hearsay evidence about the defendant's past, medical and psychiatric reports, and virtually anything else which might seem relevant to the

broad discretion exercised in sentencing. The Court evidently believes that it is consistent with due process for a State to introduce evidence of a kind traditionally considered prejudicial which is relevant only to sentencing discretion in a single-stage trial before a finding of guilt. This seems to me the only possible ground for affirming No. 68, since it is obvious that the offer of stipulation removes the need for a finding of fact as to the prior conviction in connection with the recidivist statute.

I would reverse No. 68 and remand for a new trial. For me, the State's refusal to accept the stipulation removes any vestige of legitimate interest it might have to balance against the prejudice to the accused. To nevertheless admit the evidence seems to me entirely inconsistent with the way evidence of prior convictions is traditionally handled in our legal system.

What I have said about the State's lack of interest in introducing this evidence when the defendant tries to stipulate to the prior conviction seems to me to apply equally to defendants under the Texas procedure who were not offered the opportunity of stipulating to their prior convictions. Because of the unclear state of the law in Texas as to the right to have such a stipulation accepted, the failure of a defendant to volunteer a stipulation cannot be interpreted as indicative of what would have happened if the State made stipulation a right. The Texas Court of Criminal Appeals approved a stipulation procedure for felony cases in *Pitcock* v. *State*, 367 S. W. 2d 864 (1963), on the convincing ground that, because the recidivist statutes in felony cases provided for automatic sentencing, a stipulation resolved all issues for which the prior convictions were relevant. As the court put it: "[t]o allow its introduction, after such stipulation, resolves no issue and may result in prejudice to the accused." 367 S. W. 2d, at 865. However, two later cases held that refusal by the prosecutor to accept a

stipulation, and the introduction of evidence to the jury of prior convictions over an offer of stipulation, was not reversible error. See *Sims* v. *State,* 388 S. W. 2d 714 (1965); *Ross* v. *State,* 401 S. W. 2d 844 (1966). Thus, the Texas courts reduced the stipulation procedure to an admonition to the prosecutor, and allowed refusal of the stipulation even though in felony cases the only conceivable reason the prosecutor could have for refusing was to have the benefit of the prejudicial impact of presenting prior convictions to the jury.

Because the stipulation procedure had become merely a matter of prosecutorial discretion, the petitioners in Nos. 69 and 70 cannot be said to have waived any right to stipulate their prior convictions, and it seems to me that, in the absence of a stipulation right, they must be regarded in the same light as the petitioner in No. 68, whose offer of stipulation was refused. If a defendant's offer of stipulation removes any legitimate interest the State might otherwise have in presenting prior convictions to the jury for recidivist purposes, and makes the introduction inconsistent with due process, then it seems to me that the protection of the Due Process Clause should not be limited according to whether a defendant actually explored the chance that a prosecutor might accept an offer of stipulation. Since a stipulation procedure would completely effectuate the minimal state interest in having facts found under its recidivist statutes without the inconvenience of a two-part trial, while at the same time offering a defendant the chance to prevent the possibility of prejudice, it seems to me that due process requires this safeguard.

If the admission of prior-convictions evidence solely for the purpose of enhancing punishment in the event a defendant is found guilty violates due process when the defendant is not given the right of conceding the prior-convictions evidence to prevent its admission, peti-

tioners' convictions in Nos. 68 and 69 must be reversed. No. 70, however, raises the question of whether a decision that the old Texas procedure violates due process should be retroactively applied to convictions which are final but which are collaterally attacked in the federal courts by habeas corpus. Considerations of fundamental fairness have led to the opening of final judgments in criminal cases when it has appeared that a conviction was achieved in violation of basic constitutional standards. Thus, in the decisions which have been applied retroactively, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); and *Jackson* v. *Denno*, 378 U. S. 368 (1964), the Court concluded that the constitutional error perceived undermined "the very integrity of the fact-finding process," *Linkletter* v. *Walker*, 381 U. S. 618, 639 (1965) and the fundamental fairness of the resulting conviction. On the other hand, our decisions in *Linkletter* and *Tehan* v. *Shott*, 382 U. S. 406 (1966), demonstrate that practices found to violate the Due Process Clause of the Fourteenth Amendment need not necessarily be applied to final convictions. The factors adverted to in those cases for determining whether a constitutional decision should be applied to final cases were the State's reliance on the conduct newly found unconstitutional, whether the purpose of the new rule would be served by fully retroactive effect, and the effect of retroactivity on the administration of justice.

In my view, these factors justify limiting the application of the decision I propose to nonfinal convictions. Texas came to rely on the constitutionality of the procedure involved in these cases by this Court's consistent failure to review the practice until the grant of certiorari in these cases. Moreover, there can be no doubt but that application of this rule to final convictions would seriously disrupt the administration of crim-

inal law in Texas as well as the other States which have employed a similar procedure in recidivist cases. Cf. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Thus, the question becomes whether the procedure which I would hold unconstitutional infected every proceeding of which it was a part with the clear danger of convicting the innocent. See *Tehan* v. *Shott, supra*. It seems to me that the prejudicial impact of the Texas procedure is not so great as to justify application to final cases.

In all the cases where the constitutional doctrine has been retroactively applied, the judgment was made that the procedure found erroneous went to the heart of the fairness of the conviction and raised the danger of convicting the innocent. Thus, in *Gideon* and *Douglas*, the Court concluded that failure of an indigent defendant to be represented by counsel at trial and on appeal negated the possibility of a fair adversary proceeding. Similarly, the rule of *Griffin* v. *Illinois* was retroactively applied because forcing an indigent to forgo a meaningful appeal because he could not pay for a transcript meant that the availability of a basic part of the State's system for determining guilt or innocence was conditioned on financial resources. This procedure was an obvious and fundamental denial of fairness in the process leading to conviction. In the final area where new rulings have been retroactively applied, *Jackson* v. *Denno*, the prejudice to the defendant was that he was not assured of a fair procedure in determining the voluntariness of his confession, and, moreover, that a jury might take into account a confession which it believed to be coerced in determining the defendant's guilt. Obviously, the prejudice which results from the jury's learning of a confession which is obtained unconstitutionally goes directly to the heart of the finding of guilt; and because one reason the Constitution has been held to outlaw involuntary confessions is their unreliability, *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (for

other reasons see, *e. g.*, *Rogers* v. *Richmond*, 365 U. S. 534 (1961); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961)), the procedure held unconstitutional in *Jackson* involved a danger of convicting the innocent.

In contrast to the unconstitutional procedures involved in the cases discussed above, the admission of prior-convictions evidence in connection with a recidivist statute does not seem to me to justify reversal of final convictions. The fact that prior-convictions evidence has been traditionally admitted when related to guilt or innocence suggests that its prejudice has not been thought so great as to undermine "the very integrity of the fact-finding process" and to involve a "clear danger of convicting the innocent." See *Linkletter* v. *Walker*, 381 U. S., at 639; *Tehan* v. *Shott*, 382 U. S., at 416. Consequently, I would not apply a decision in line with this dissent to final convictions, such as No. 70, a habeas corpus proceeding.

The decision I propose is consistent with a large body of judicial thought. Two United States Courts of Appeals have adopted the view that recidivist procedures which authorize admission of prior-convictions evidence before the jury determines that the defendant is guilty violate due process. In *Lane* v. *Warden*, 320 F. 2d 179 (C. A. 4th Cir. 1963), the court reasoned that "it is patent that jurors would be likely to find a man guilty of a narcotics violation more readily if aware that he has had prior illegal association with narcotics. . . . Such a prejudice would clearly violate the standards of impartiality required for a fair trial." 320 F. 2d, at 185. In the same vein, the Third Circuit, in *United States* v. *Banmiller*, 310 F. 2d 720 (1962), reasoned that a procedure like the one involved in the three cases at bar would cause the jury to have in mind the defendant's previous convictions in determining his guilt of the crime currently charged. Both these courts, in fact, went farther than I would, in that they applied their decisions to final

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convictions. In England, the prejudice which results from proof of prior crimes before a finding of guilt has been recognized for more than a century, and the rule has been that a finding as to prior crimes is made in a separate hearing after the finding of guilt.[10]

The majority of States have adopted procedures which cure the prejudice inherent in the procedure in the cases at bar. In all, some 31 States have recidivist procedures which postpone the introduction of prior convictions until after the jury has found the defendant guilty of the crime currently charged.[11] And at least three others

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[10] Coinage Offences Act, 1861, 24 & 25 Vict., c. 99; Act of 6 & 7 Will. 4, c. 111; *Reg.* v. *Shuttleworth*, 3 Car. & K. 375.

[11] The States which have adopted a procedure either by legislation or judicial decision which separates the determination of prior convictions from the determination of guilt of the crime currently charged are: Alaska, Alaska Stat. § 12.55.060 (1962); Arkansas, *Miller* v. *State*, 239 Ark. 836, 394 S. W. 2d 601 (1965); Colorado, *Heinze* v. *People*, 127 Colo. 54, 253 P. 2d 596 (1953); Connecticut, *State* v. *Ferrone*, 96 Conn. 160, 113 A. 452 (1921); Delaware, Del. Code Ann. Tit. 11, § 3912 (b) (Supp. 1964); Florida, Fla. Stat. Ann. § 775.11 (1965), *Shargaa* v. *State*, 102 So. 2d 814 (1958); Idaho, *State* v. *Johnson*, 86 Idaho 51, 383 P. 2d 326 (1963); Illinois, Ill. Rev. Stat. c. 38, §§ 603.1–603.9 (1963), Ill. Rev. Stat. c. 38, § 22–43 (1965); Kansas, Kan. Gen. Stat. Ann. § 21–107a (1949); Louisiana, La. Rev. Stat. Ann. § 15:529.1 D (Supp. 1962); Maryland, Md. Rule of Proc. 713; Michigan, Mich. Stat. Ann. § 28.1085 (1954); Minnesota, Minn. Stat. Ann. § 609.16; Missouri, Mo. Rev. Stat. § 556.280 (1959); Nebraska, Neb. Rev. Stat. § 29–2221 (1964); New York, N. Y. Pen. Law § 1943; New Mexico, *Johnson* v. *Cox*, 72 N. M. 55, 380 P. 2d 199 (1963); North Dakota, N. D. Cent. Code § 12–06–23 (1960); Ohio, Ohio Rev. Code Ann. § 2961.13 (1954); Oklahoma, Okla. Stat. Ann. Tit. 22, § 860 (Supp. 1964), *Harris* v. *State*, 369 P. 2d 187 (1962); Oregon, Ore. Rev. Stat. § 168.065 (1961); Pennsylvania, Pa. Stat. Ann. Tit. 18, § 5108 (1963); South Dakota, S. D. Code § 13.0611 (3) (1939); Tennessee, Tenn. Code Ann. § 40–2801 (1955), *Harrison* v. *State*, — Tenn. —, 394 S. W. 2d 713 (1965); Texas, Texas Code Crim. Proc. Art.

have substantially mitigated the prejudice of the single-stage recidivist procedure by affording the defendant the right to stipulate to his prior crimes to prevent their introduction at the trial.[12] Thus, only 16 States still maintain the needlessly prejudicial procedure exemplified in these three cases. The decision I propose would require only a small number of States to make a relatively minor adjustment in their criminal procedure to avoid the manifest unfairness and prejudice which have already been eliminated in England and in 34 of the United States.

I would reverse the convictions in Nos. 68 and 69 and remand for a new trial. In No. 70, I would affirm this final conviction.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I join the opinion of THE CHIEF JUSTICE insofar as that opinion would reverse in Nos. 68 and 69. I would,

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36.01 (1966); Utah, Utah Code Ann. § 76–1–19 (1953), *State* v. *Stewart*, 110 Utah 203, 171 P. 2d 383 (1946); Virginia, Va. Code Ann. § 53–296 (1958); Washington, *State* v. *Kirkpatrick*, 181 Wash. 313, 43 P. 2d 44 (1935); West Virginia, W. Va. Code Ann. § 6131 (1961). In addition to these 29 States, two States take prior convictions into account in the determination of when a convict is eligible for parole, and entrust the fact-finding determination to parole boards: Mississippi, Miss. Code Ann. § 4004–03 (Supp. 1964), as amended, Miss. Laws 1964, c. 366; New Jersey, N. J. Stat. Ann. § 30:4–123.12 (1964), N. J. Rev. Stat. § 2A:85–13 (Supp. 1966). Thus, 31 States in all have adopted wholly nonprejudicial procedures in connection with their recidivist statutes.

[12] The three States which have adopted a stipulation procedure are: Arizona, Ariz. Rule Crim. Proc. 180, Ariz. Code Ann. § 44–1004 (1939), *Montgomery* v. *Eyman*, 96 Ariz. 55, 391 P. 2d 915 (1964); California, Cal. Penal Code § 1025, *People* v. *Hobbs*, 37 Cal. App. 2d 8, 98 P. 2d 775 (1940); and Wisconsin, *State* v. *Meyer*, 258 Wis. 326, 46 N. W. 2d 341 (1951).

however, also reverse in No. 70. It seems to me that the constitutional error here involved undermined "the very integrity of the fact-finding process," *Linkletter* v. *Walker*, 381 U. S. 618, 639, and I would therefore apply the rule retroactively. *Gideon* v. *Wainwright*, 372 U. S. 335; *Douglas* v. *California*, 372 U. S. 353; *Griffin* v. *Illinois*, 351 U. S. 12; *Jackson* v. *Denno*, 378 U. S. 368.

Syllabus.

KEYISHIAN ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

No. 105. Argued November 17, 1966.—Decided January 23, 1967.

Appellants, faculty members of the State University of New York and a nonfaculty employee, brought this action for declaratory and injunctive relief, claiming that New York's teacher loyalty laws and regulations are unconstitutional. Their continued employment had been terminated or was threatened when each appellant faculty member refused to comply with a requirement of the university trustees that he certify that he was not a Communist and that if he had ever been one he had so advised the university president; and the nonfaculty employee refused to state under oath whether he had advocated or been a member of a group which advocated forceful overthrow of the government. Under § 3021 of New York's Education Law "treasonable or seditious" utterances or acts are grounds for dismissal from the public school system, as well as under § 105, subd. 3, of the Civil Service Law. Other provisions of § 105 of the Civil Service Law disqualify from the civil service or employment in the educational system any person advocating or involved with the distribution of written material which advocates the forceful overthrow of the government. Section 3021 does not define "treasonable or seditious." Section 105, subd. 3, provides that "treasonable word or act" shall mean "treason" as defined in the Penal Law and "seditious word or act" shall mean "criminal anarchy" as therein defined. Section 3022 (the Feinberg Law) of the Education Law requires the State Board of Regents to issue regulations for the disqualification or removal on loyalty grounds of faculty or other personnel in the state educational system, to make a list of "subversive" organizations, and to provide that membership therein constitutes prima facie evidence of disqualification for employment. The Board listed the National and State Communist Parties as "subversive organizations" under the law, but shortly before the trial of this case the university trustees' certificate requirement was rescinded and it was announced that no person would be ineligible for employment "solely" because he refused to sign the

certificate, and that §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law constituted part of the employment contract. A three-judge District Court sustained the constitutionality of these provisions against appellants' challenges of vagueness and overbreadth and dismissed the complaint. *Held:*

1. *Adler* v. *Board of Education*, 342 U. S. 485, in which this Court upheld some aspects of the New York teacher loyalty plan before its extension to state institutions of higher learning, is not controlling, the vagueness issue presented here involving § 3021 and § 105 not having been decided in *Adler*, and the validity of the subversive organization membership provision of § 3022 having been upheld for reasons subsequently rejected by this Court. Pp. 593–595.

2. The rescission of the certificate requirement does not moot this case, as the substance of the statutory and regulatory complex challenged by appellants remains. P. 596.

3. Section 3021 of the Education Law and § 105, subds. 1 (a), 1 (b), and 3, of the Civil Service Law as implemented by the machinery created pursuant to § 3022 of the Education Law, are unconstitutionally vague, since no teacher can know from § 3021 of the Education Law and § 105, subd. 3, of the Civil Service Law what constitutes the boundary between "seditious" and nonseditious utterances and acts, and the other provisions may well prohibit the employment of one who advocates doctrine abstractly without any attempt to incite others to action, and may be construed to cover mere expression of belief. Pp. 597–604.

(a) These provisions, which have not been interpreted by the New York courts, can have a stifling effect on the "free play of the spirit which all teachers ought especially to cultivate and practice" (*Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion)). Pp. 601–602.

(b) Academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. P. 603.

(c) The prolixity and profusion of statutes, regulations, and administrative machinery, and manifold cross-references to interrelated enactments and rules aggravate the problem of vagueness of wording. P. 604.

4. The provisions of the Civil Service Law (§ 105, subd. 1 (c)) and the Education Law (§ 3022, subd. 2), which make Communist Party membership, as such, prima facie evidence of disqualifica-

tion for employment in the public school system are "overbroad" and therefore unconstitutional. Pp. 605–610.

(a) Constitutional doctrine after this Court's upholding of § 3022, subd. 2, in *Adler* has rejected its major premise that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. P. 605.

(b) Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for imposing sanctions. Pp. 606–610.

255 F. Supp. 981, reversed and remanded.

Richard Lipsitz argued the cause for appellants. With him on the briefs was *Rosario J. Di Lorenzo.*

Ruth V. Iles, Assistant Attorney General of New York, argued the cause for appellees Board of Regents et al. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Acting Solicitor General. *John C. Crary, Jr.,* argued the cause and filed a brief for appellees Board of Trustees of the State University of New York et al.

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. *Ralph F. Fuchs, Bernard Wolfman* and *Herman I. Orentlicher* filed a brief for the American Association of University Professors, as *amicus curiae.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the University was merged in 1962 into the State University of New York, an institution of higher education owned and operated by the State of New York. As faculty members of the State University their continued employment was conditioned upon their compliance with a New York plan, formulated

partly in statutes and partly in administrative regulations,[1] which the State utilizes to prevent the appointment or retention of "subversive" persons in state employment.

Appellants Hochfield and Maud were Assistant Professors of English, appellant Keyishian an instructor in English, and appellant Garver, a lecturer in philosophy. Each of them refused to sign, as regulations then in effect required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York. Each was notified that his failure to sign the certificate would require his dismissal. Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate. Hochfield and Garver, whose contracts still had time to run, continue to teach, but subject to proceedings for their dismissal if the constitutionality of the New York plan is sustained. Maud has voluntarily resigned and therefore no longer has standing in this suit.

Appellant Starbuck was a nonfaculty library employee and part-time lecturer in English. Personnel in that classification were not required to sign a certificate but were required to answer in writing under oath the question, "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" Starbuck refused to answer the question and as a result was dismissed.

Appellants brought this action for declaratory and injunctive relief, alleging that the state program violated the Federal Constitution in various respects. A three-

[1] The text of the pertinent statutes and administrative regulations in effect at the time of trial appears in the Appendix to the opinion.

judge federal court held that the program was constitutional. 255 F. Supp. 981.[2] We noted probable jurisdiction of appellants' appeal, 384 U. S. 998. We reverse.

I.

We considered some aspects of the constitutionality of the New York plan 15 years ago in *Adler* v. *Board of Education*, 342 U. S. 485. That litigation arose after New York passed the Feinberg Law which added § 3022 to the Education Law.[3] The Feinberg Law was enacted to implement and enforce two earlier statutes. The first was a 1917 law, now § 3021 of the Education Law, under which "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act" is a ground for dismissal from the public school system. The second was a 1939 law which was § 12–a of the Civil Service Law when *Adler* was decided and, as amended, is now § 105 of that law. This law disqualifies from the civil service and from employment in the educational system any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society or group of persons advocating such doctrine.

The Feinberg Law charged the State Board of Regents with the duty of promulgating rules and regulations providing procedures for the disqualification or removal of persons in the public school system who violate the 1917 law or who are ineligible for appointment to or

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[2] The District Court initially refused to convene a three-judge court, 233 F. Supp. 752, and was reversed by the Court of Appeals for the Second Circuit. 345 F. 2d 236.

[3] For the history of New York loyalty-security legislation, including the Feinberg Law, see Chamberlain, Loyalty and Legislative Action, and that author's article in Gellhorn, The States and Subversion 231.

retention in the public school system under the 1939 law. The Board of Regents was further directed to make a list, after notice and hearing, of "subversive" organizations, defined as organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means. Finally, the Board was directed to provide in its rules and regulations that membership in any listed organization should constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the State.

The Board of Regents thereupon promulgated rules and regulations containing procedures to be followed by appointing authorities to discover persons ineligible for appointment or retention under the 1939 law, or because of violation of the 1917 law. The Board also announced its intention to list "subversive" organizations after requisite notice and hearing, and provided that membership in a listed organization after the date of its listing should be regarded as constituting prima facie evidence of disqualification, and that membership prior to listing should be presumptive evidence that membership has continued, in the absence of a showing that such membership was terminated in good faith. Under the regulations, an appointing official is forbidden to make an appointment until after he has first inquired of an applicant's former employers and other persons to ascertain whether the applicant is disqualified or ineligible for appointment. In addition, an annual inquiry must be made to determine whether an appointed employee has ceased to be qualified for retention, and a report of findings must be filed.

Adler was a declaratory judgment suit in which the Court held, in effect, that there was no constitutional infirmity in former § 12–a or in the Feinberg Law on their faces and that they were capable of constitutional application. But the contention urged in this case that

both § 3021 and § 105 are unconstitutionally vague was not heard or decided. Section 3021 of the Education Law was challenged in *Adler* as unconstitutionally vague, but because the challenge had not been made in the pleadings or in the proceedings in the lower courts, this Court refused to consider it. 342 U. S., at 496. Nor was any challenge on grounds of vagueness made in *Adler* as to subdivisions 1 (a) and (b) of § 105 of the Civil Service Law.[4] Subdivision 3 of § 105 was not added until 1958. Appellants in this case timely asserted below the unconstitutionality of all these sections on grounds of vagueness and that question is now properly before us for decision. Moreover, to the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case.

II.

A 1953 amendment extended the application of the Feinberg Law to personnel of any college or other institution of higher education owned and operated by the State or its subdivisions. In the same year, the Board of Regents, after notice and hearing, listed the Communist Party of the United States and of the State of New York as "subversive organizations." In 1956 each applicant for an appointment or the renewal of an appointment was required to sign the so-called "Feinberg Certificate" declaring that he had read the Regents Rules and understood that the Rules and the statutes

[4] The sole "vagueness" contention in *Adler* concerned the word "subversive," appearing in the preamble to and caption of § 3022. 342 U. S., at 496.

constituted terms of employment, and declaring further that he was not a member of the Communist Party, and that if he had ever been a member he had communicated that fact to the President of the State University. This was the certificate that appellants Hochfield, Maud, Keyishian, and Garver refused to sign.

In June 1965, shortly before the trial of this case, the Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment "solely" because he refused to sign the certificate. In lieu of the certificate, it was provided that each applicant be informed before assuming his duties that the statutes, §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law, constituted part of his contract. He was particularly to be informed of the disqualification which flowed from membership in a listed "subversive" organization. The 1965 announcement further provides: "Should any question arise in the course of such inquiry such candidate may request . . . a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." A brochure is also given new applicants. It outlines and explains briefly the legal effect of the statutes and invites any applicant who may have any question about possible disqualification to request an interview. The covering announcement concludes that "a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required."

The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certificate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application.

III.

Section 3021 requires removal for "treasonable or seditious" utterances or acts. The 1958 amendment to § 105 of the Civil Service Law, now subdivision 3 of that section, added such utterances or acts as a ground for removal under that law also.[5] The same wording is used in both statutes—that "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" shall be ground for removal. But there is a vital difference between the two laws. Section 3021 does not define the terms "treasonable or

[5] There is no merit in the suggestion advanced by the Attorney General of New York for the first time in his brief in this Court that § 3021 of the Education Law and § 105, subd. 3, of the Civil Service Law are not "pertinent to our inquiry." Section 3022 of the Education Law incorporates by reference the provisions of both, thereby rendering them applicable to faculty members of all colleges and institutions of higher education. One of the reasons why the Court of Appeals ordered the convening of a three-judge court was that a substantial federal question was presented by the fact that "Adler . . . refused to pass upon the constitutionality of section 3021 . . . [and that] several statutory amendments, such as Section 105 (3) of the Civil Service Law, are all subsequent to Adler." 345 F. 2d 236, 238. The three-judge court also properly found these provisions applicable to appellants in holding them constitutional. It is significant that appellees consistently defended the constitutionality of these sections in the courts below. Moreover, the three-judge court rendered its decision upon the basis of a "Stipulation of Fact," paragraph 20 of which recites:

"Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: Subdivision (1) of Section 3022, as amended . . . directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law."

seditious" as used in that section; in contrast, subdivision 3 of § 105 of the Civil Service Law provides that the terms "treasonable word or act" shall mean "treason" as defined in the Penal Law and the terms "seditious word or act" shall mean "criminal anarchy" as defined in the Penal Law.

Our experience under the Sedition Act of 1798, 1 Stat. 596, taught us that dangers fatal to First Amendment freedoms inhere in the word "seditious." See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 273–276. And the word "treasonable," if left undefined, is no less dangerously uncertain. Thus it becomes important whether, despite the omission of a similar reference to the Penal Law in § 3021, the words as used in that section are to be read as meaning only what they mean in subdivision 3 of § 105. Or are they to be read more broadly and to constitute utterances or acts "seditious" and "treasonable" which would not be so regarded for the purposes of § 105?

Even assuming that "treasonable" and "seditious" in § 3021 and § 105, subd. 3, have the same meaning, the uncertainty is hardly removed. The definition of "treasonable" in the Penal Law presents no particular problem. The difficulty centers upon the meaning of "seditious." Subdivision 3 equates the term "seditious" with "criminal anarchy" as defined in the Penal Law. Is the reference only to Penal Law § 160, defining criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means"? But that section ends with the sentence "The advocacy of such doctrine either by word of mouth or writing is a felony." Does that sentence draw into § 105, Penal Law § 161, proscribing "advocacy of criminal anarchy"? If so, the

possible scope of "seditious" utterances or acts has virtually no limit. For under Penal Law § 161, one commits the felony of advocating criminal anarchy if he ". . . publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means." [6] Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on "those with a conscientious and scrupulous regard for such undertakings." *Baggett* v. *Bullitt*, 377 U. S. 360, 374. Even were it certain that the definition referred to in § 105 was solely Penal Law § 160, the scope of § 105 still remains indefinite. The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.

Other provisions of § 105 also have the same defect of vagueness. Subdivision 1 (a) of § 105 bars employment of any person who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite

[6] Penal Law §§ 160–161 are to be replaced effective September 1, 1967, by a single provision entitled "criminal advocacy."

others to action in furtherance of unlawful aims.[7] See *Herndon* v. *Lowry*, 301 U. S. 242; *Yates* v. *United States*, 354 U. S. 298; *Noto* v. *United States*, 367 U. S. 290; *Scales* v. *United States*, 367 U. S. 203. And in prohibiting "advising" the "doctrine" of unlawful overthrow does the statute prohibit mere "advising" of the existence of the doctrine, or advising another to support the doctrine? Since "advocacy" of the doctrine of forceful overthrow is separately prohibited, need the person "teaching" or "advising" this doctrine himself "advocate" it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?

Similar uncertainty arises as to the application of subdivision 1 (b) of § 105. That subsection requires the disqualification of an employee involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow, and who himself "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein." Here again, mere advocacy of abstract doctrine is apparently included.[8] And does

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[7] The New York State Legislative Committee on Public Employee Security Procedures, in describing this provision, noted:

"In disqualifying for employment those who advocate or teach the 'doctrine' of the violent overthrow of government, [§ 105] is to be distinguished from the language of the Smith Act (18 U. S. C. §§ 371, 2385), which has been construed by the Supreme Court to make it criminal to incite to 'action' for the forcible overthrow of government, but not to teach the 'abstract doctrine' of such forcible overthrow. *Yates* v. *United States*, 354 U. S. 298 (1957)." 1958 N. Y. State Legis. Annual 70, n. 1.

[8] Compare the Smith Act, 18 U. S. C. § 2385, which punishes one who "prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of" unlawful overthrow, provided he is shown to have an "intent to cause the overthrow or destruction of any such government."

the prohibition of distribution of matter "containing" the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? The additional requirement, that the person participating in distribution of the material be one who "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine" of forceful overthrow, does not alleviate the uncertainty in the scope of the section, but exacerbates it. Like the language of § 105, subd. 1 (a), this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials thereby "advocate . . . the . . . propriety of adopting the doctrine contained therein"?

We do not have the benefit of a judicial gloss by the New York courts enlightening us as to the scope of this complicated plan.[9] In light of the intricate administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett* v. *Bullitt, supra,* at 374. The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice . . . ." [10] That probability is enhanced by the provisions requiring an

[9] This is not a case where abstention pending state court interpretation would be appropriate, *Baggett* v. *Bullitt, supra,* at 375–379; *Dombrowski* v. *Pfister,* 380 U. S. 479, 489–490.

[10] *Wieman* v. *Updegraff,* 344 U. S. 183, 195 (Frankfurter, J., concurring).

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annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws. For a memorandum warns employees that under the statutes "subversive" activities may take the form of "[t]he writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others," and reminds them "that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488. The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In *De Jonge* v. *Oregon*, 299 U. S. 353, 365, the Court said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker, supra,* at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States* v. *Associated Press,* 52 F. Supp. 362, 372. In *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N. A. A. C. P.* v. *Button,*

371 U. S. 415, 438; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 432–433. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . ." *Speiser* v. *Randall*, 357 U. S. 513, 526. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N. A. A. C. P.* v. *Button*, *supra*, at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. See *Stromberg* v. *California*, 283 U. S. 359, 369; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Baggett* v. *Bullitt*, *supra*.

The regulatory maze created by New York is wholly lacking in "terms susceptible of objective measurement." *Cramp* v. *Board of Public Instruction*, *supra*, at 286. It has the quality of "extraordinary ambiguity" found to be fatal to the oaths considered in *Cramp* and *Baggett* v. *Bullitt*. "[M]en of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt*, *supra*, at 367. Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.

We therefore hold that § 3021 of the Education Law and subdivisions 1 (a), 1 (b) and 3 of § 105 of the Civil Service Law as implemented by the machinery created pursuant to § 3022 of the Education Law are unconstitutional.

IV.

Appellants have also challenged the constitutionality of the discrete provisions of subdivision 1 (c) of § 105 and subdivision 2 of the Feinberg Law, which make Communist Party membership, as such, prima facie evidence of disqualification. The provision was added to subdivision 1 (c) of § 105 in 1958 after the Board of Regents, following notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as "subversive" organizations. Subdivision 2 of the Feinberg Law was, however, before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Teachers, the Court said in *Adler*, "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." 342 U. S., at 492. The Court also stated that a teacher denied employment because of membership in a listed organization "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." *Id.*, at 493.

However, the Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, ". . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless

of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions following *Adler*. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Education*, 350 U. S. 551; *Cramp* v. *Board of Public Instruction*, *supra*; *Baggett* v. *Bullitt*, *supra*; *Shelton* v. *Tucker*, *supra*; *Speiser* v. *Randall*, *supra*; see also *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Torcaso* v. *Watkins*, 367 U. S. 488. In *Sherbert* v. *Verner*, 374 U. S. 398, 404, we said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

We proceed then to the question of the validity of the provisions of subdivision 1 (c) of § 105 and subdivision 2 of § 3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since *Adler*. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.

In *Elfbrandt* v. *Russell*, 384 U. S. 11, we said, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id.*, at 17. We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that "[a]ny lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Elfbrandt* v. *Russell*, *supra*, at 16. In *Aptheker* we held that Party membership, without knowl-

edge of the Party's unlawful purposes *and* specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we said in *Schneiderman* v. *United States*, 320 U. S. 118, 136, "[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization . . . do not subscribe unqualifiedly to all of its platforms or asserted principles." "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." *Elfbrandt, supra*, at 19. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see *Scales* v. *United States*, 367 U. S. 203; *Noto* v. *United States*, 367 U. S. 290; *Yates* v. *United States*, 354 U. S. 298;[11] nor may it warrant a finding of moral unfitness justifying disbarment. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

These limitations clearly apply to a provision, like § 105, subd. 1 (c), which blankets all state employees, regardless of the "sensitivity" of their positions. But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies.[12] *Elfbrandt* and *Aptheker* state the

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[11] Whether or not loss of public employment constitutes "punishment," cf. *United States* v. *Lovett*, 328 U. S. 303, there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial.

[12] See Lazarsfeld & Thielens, The Academic Mind 92–112, 192–217; Biddle, The Fear of Freedom 155 *et seq.*; Jahoda & Cook,

governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.

Measured against this standard, both Civil Service Law § 105, subd. 1 (c), and Education Law § 3022, subd. 2, sweep overbroadly into association which may not be proscribed. The presumption of disqualification arising from proof of mere membership may be rebutted, but only by (a) a denial of membership, (b) a denial that the organization advocates the overthrow of government by force, or (c) a denial that the teacher has knowledge of such advocacy. *Lederman* v. *Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466, aff'd, 301 N. Y. 476, 95 N. E. 2d 806.[13] Thus proof of nonactive membership or a showing of the absence of intent to further unlawful aims will not rebut the presumption and defeat dismissal. This is emphasized in official administrative interpretations. For example, it is said in a letter addressed to prospective appointees by the President of the State University, "You will note that . . . both the Law and regulations are very specifically directed toward the elimination and nonappointment of 'Communists' from or to our teaching ranks . . . ." The Feinberg Certificate was even more explicit: "Anyone who is a

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Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs, 61 Yale L. J. 295 (1952). See generally, MacIver, Academic Freedom in Our Time; Hullfish, Educational Freedom in an Age of Anxiety; Konvitz, Expanding Liberties 86–108; Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemp. Prob. 487 (1963).

[13] In light of our disposition, we need not consider appellants' contention that the burden placed on the employee of coming forward with substantial rebutting evidence upon proof of membership in a listed organization is constitutionally impermissible. Compare *Speiser* v. *Randall*, 357 U. S. 513.

member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University." (Emphasis supplied.) This official administrative interpretation is supported by the legislative preamble to the Feinberg Law, § 1, in which the legislature concludes as a result of its findings that "it is essential that the laws prohibiting persons who are *members* of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced." (Emphasis supplied.)

Thus § 105, subd. 1 (c), and § 3022, subd. 2, suffer from impermissible "overbreadth." *Elfbrandt* v. *Russell, supra,* at 19; *Aptheker* v. *Secretary of State, supra; N. A. A. C. P.* v. *Button, supra; Saia* v. *New York,* 334 U. S. 558; *Schneider* v. *State,* 308 U. S. 147; *Lovell* v. *Griffin,* 303 U. S. 444; cf. *Hague* v. *C. I. O.,* 307 U. S. 496, 515–516; see generally *Dombrowski* v. *Pfister,* 380 U. S. 479, 486. They seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, "the hazard of loss or substantial impairment of those precious rights may be critical," *Dombrowski* v. *Pfister, supra,* at 486, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. As we said in *Shelton* v. *Tucker, supra,* at 488, "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

We therefore hold that Civil Service Law § 105, subd. 1 (c), and Education Law § 3022, subd. 2, are invalid insofar as they proscribe mere knowing membership

without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Civil Service Law.

§ 105. Subversive activities; disqualification

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of

any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason," as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

EDUCATION LAW.

§ 3021. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. Elimination of subversive persons from the public school system

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Rules of the Board of Regents.

(Adopted July 15, 1949.)

ARTICLE XVIII.

SUBVERSIVE ACTIVITIES.

Section 244. Disqualification or removal of superintendents, teachers and other employes.

1 The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein re-

*Now section 105.

ferred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2 Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute prima facie evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3 On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions

*Now section 105.

herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4 Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

PENAL LAW.

§ 160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

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§ 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK.

Resolved that Resolution 65–100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56–98 adopted on October 11, 1956, incorporated into the Policies of

the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded*, and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or

recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

Resolved that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall not be deemed disqualified or ineligible solely by reason of such failure, for appointment or reappointment in the professional service of the University in the manner provided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and

Further Resolved that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The blunderbuss fashion in which the majority couches "its artillery of words," together with the morass of cases it cites as authority and the obscurity of their application

to the question at hand, makes it difficult to grasp the true thrust of its decision. At the outset, it is therefore necessary to focus on its basis.

This is a declaratory judgment action testing the *application* of the Feinberg Law to appellants. The certificate and statement once required by the Board of Trustees of the State University and upon which appellants base their attack were, before the case was tried, abandoned by the Board and are no longer required to be made. Despite this fact the majority proceeds to its decision striking down New York's Feinberg Law and other statutes as applied to appellants on the basis of the old certificate and statement. It does not explain how the statute can be applied to appellants under procedures which have been for almost two years a dead letter. The issues posed are, therefore, purely abstract and entirely speculative in character. The Court under such circumstances has in the past refused to pass upon constitutional questions. In addition, the appellants have neither exhausted their administrative remedies, nor pursued the remedy of judicial review of agency action as provided earlier by subdivision (d) of § 12–a of the Civil Service Law. Finally, one of the sections stricken, § 105, subd. 3, has been amended by a revision which under its terms will not become effective until September 1, 1967. (Laws 1965, c. 1030, § 240.15, Revised Penal Law of 1965.)

I.

The old certificate upon which the majority operates required all of the appellants, save Starbuck, to answer the query whether they were Communists, and if they were, whether they had communicated that fact to the President of the State University. Starbuck was required to answer whether he had ever advised, taught, or been a member of a group which taught or advocated the doctrine that the Government of the United States, or any

of its political subdivisions, should be overthrown by force, violence, or any unlawful means. All refused to comply. It is in this nonexistent frame of reference that the majority proceeds to act.

It is clear that the Feinberg Law, in which this Court found "no constitutional infirmity" in 1952, has been given its death blow today. Just as the majority here finds that there "can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion" there can also be no doubt that "the be-all and end-all" of New York's effort is here. And, regardless of its correctness, neither New York nor the several States that have followed the teaching of *Adler* v. *Board of Education*, 342 U. S. 485, for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.

The section (§ 3021 of the Education Law) which authorizes the removal of superintendents, teachers, or employees in the public schools in any city or school district of New York for the utterance of any treasonable or seditious word or words is also struck down, even though it does not apply to appellants, as we shall discuss below.

Also declared unconstitutional are the subdivisions (1 (a), 1 (b) and 1 (c) of § 105 of the Civil Service Law) which prevent the appointment and authorize the discharge of any superintendent, principal, or teacher in any part of New York's public education establishment who wilfully advocates, advises, or teaches the doctrine that the Government of the United States, or of any State or any political subdivision thereof should be overthrown by force, violence, or any other unlawful means (1 (a)); or who prints, publishes, edits, issues, or sells any book, paper, document, or written or printed matter, in any form, containing such doctrine *and* "who advocates, advises, teaches, or embraces the duty, necessity or

propriety of adopting the doctrine contained therein" (1 (b)); or who organizes or helps to organize or becomes a member of any society or group which teaches or advocates such doctrine (1 (c)). This latter provision was amended in 1958, while still part of § 12–a of the Civil Service Law, to make membership in the Communist Party prima facie proof of disqualification. The language "advocate, advise, teach," etc., obviously springs from federal statutes, particularly the Smith Act, § 2 (a)(1), (2) and (3), 54 Stat. 671, which was approved by this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951). State statutes of similar character and language have been approved by this Court. See *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Beilan* v. *Board of Education*, 357 U. S. 399 (1958).

Lastly stricken is the subdivision (3 of § 105) which authorizes the discharge of any person in the civil service of the State or any civil division thereof who utters any treasonable or seditious word or commits any treasonable or seditious act, although this subdivision is not and never has been a part of the Feinberg Law and New York specifically disclaims its applicability to the appellants. In addition, how can the Court pass upon this law *as applied* when the State has never attempted to and now renounces its application to appellants?

II.

This Court has again and again, since at least 1951, approved procedures either identical or at the least similar to the ones the Court condemns today. In *Garner* v. *Board of Public Works of Los Angeles, supra,* we held that a public employer was not precluded, simply because it was an agency of the State, "from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service." 341 U. S., at 720. The oath there used practically the same lan-

guage as the Starbuck statement here and the affidavit reflects the same type of inquiry as was made in the old certificate condemned here. Then in 1952, in *Adler* v. *Board of Education, supra,* this Court passed upon the identical statute condemned here. It, too, was a declaratory judgment action—as in this case. However, there the issues were not so abstractly framed. Our late Brother Minton wrote for the Court:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." At 493.

And again in 1958 the problem was before us in *Beilan* v. *Board of Education, supra.* There our late Brother Burton wrote for the Court:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher." 357 U. S., at 405.

And on the same day in *Lerner* v. *Casey,* 357 U. S. 468, our Brother HARLAN again upheld the severance of a public employee for his refusal to answer questions concerning his loyalty. And also on the same day my Brother BRENNAN himself cited *Garner* with approval in *Speiser* v. *Randall,* 357 U. S. 513 (1958).

Since that time the *Adler* line of cases has been cited again and again with approval: *Shelton* v. *Tucker,* 364

U. S. 479 (1960), in which both *Adler* and *Beilan* were quoted with approval, and *Garner* and *Lerner* were cited in a like manner; likewise in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), *Adler* was quoted twice with approval; and, in a related field where the employee was discharged for refusal to answer questions as to his loyalty after being ordered to do so, *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960), the Court cited with approval all of the cases which today it says have been rejected, *i. e.*, *Garner*, *Adler*, *Beilan* and *Lerner*. Later *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961), likewise cited with approval both *Beilan* and *Garner*. And in our decision in *In re Anastaplo*, 366 U. S. 82 (1961), *Garner*, *Beilan* and *Lerner* were all referred to. Finally, only three Terms ago my Brother WHITE relied upon *Cramp*, which in turn cited *Adler* with approval twice. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

In view of this long list of decisions covering over 15 years of this Court's history, in which no opinion of this Court even questioned the validity of the *Adler* line of cases, it is strange to me that the Court now finds that the "constitutional doctrine which has emerged since . . . has rejected [*Adler*'s] major premise." With due respect, as I read them, our cases have done no such thing.

III.

The majority also finds that *Adler* did not pass upon § 3021 of the Education Law, nor subdivision 3 of § 105 of the Civil Service Law, nor upon the vagueness questions of subdivisions 1 (a), 1 (b) and 1 (c) of § 105. I will now discuss them.

1. Section 3021 is not applicable to these appellants. As Attorney General Lefkowitz of New York says on behalf of the State, the Board of Regents and the Civil Service Commission, this section by its own terms applies only to superintendents, teachers, and employees in the

"public schools, in any city or school district of the state . . . ." It does not apply to teachers in the State University at all.*

2. Likewise subdivision 3 of § 105 is also inapplicable. It was derived from § 23–a of the Civil Service Law. The latter provision was on the books at the time of the Feinberg Law as well as when *Adler* was decided. The Feinberg Law referred only to § 12–a of the Civil Service Law, not § 23–a. Section 12–a was later recodified as subdivisions 1 (a), (b) and (c) of § 105 of the Civil Service Law. Section 23–a (now § 105, subd. 3) deals only with the civil divisions of the civil service of the State. As the Attorney General tells us, the law before us has to do with the qualifications of college level personnel not covered by civil service. The Attorney General also advises that no superintendent, teacher, or employee of the educational system has ever been charged with violating § 105, subd. 3. The Court seems to me to be building straw men.

3. The majority also says that no challenge or vagueness points were passed upon in *Adler*. A careful examination of the briefs in that case casts considerable doubt on this conclusion. In the appellants' brief, point 3, in *Adler*, the question is stated in this language: "The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness." Certainly the word "subversive" is attacked as vague and the Court finds that it "has a

*The Court points to a stipulation of counsel that § 3022 incorporates § 3021 into the Feinberg Law. However, Attorney General Lefkowitz did not sign the stipulation itself, but in an addendum thereto, agreed only that it constituted the *record of fact*—not of law. His brief contends that § 3021 is not incorporated into the law. The legislature, of course, is the only body that could incorporate § 3021 into the Feinberg Law. It has not done so.

very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence." 342 U. S., at 496. Significantly this is the language of subdivisions 1 (a) and (b) which the majority now finds vague, as covering one "who merely advocates the doctrine in the abstract . . ." citing such criminal cases as *Herndon* v. *Lowry*, 301 U. S. 242 (1937), which was on our books long before the *Adler* line of cases. Also significant is the fact that the *Adler* opinion's last sentence is "We find no constitutional infirmity in § 12–a [now subdivisions 1 (a), 1 (b) and 1 (c) of § 105] of the Civil Service Law of New York or in the Feinberg Law which implemented it . . . ." At 496.

IV.

But even if *Adler* did not decide these questions I would be obliged to answer them in the same way. The only portion of the Feinberg Law which the majority says was not covered there and is applicable to appellants is § 105, subd. 1 (a), 1 (b) and 1 (c). These have to do with teachers who advocate, advise, or teach the doctrine of overthrow of our Government by force and violence, either orally or in writing. This was the identical conduct that was condemned in *Dennis* v. *United States, supra.* There the Court found the exact verbiage not to be unconstitutionally vague, and that finding was of course not affected by the decision of this Court in *Yates* v. *United States*, 354 U. S. 298. The majority makes much over the horribles that might arise from subdivision 1 (b) of § 105 which condemns the printing, publishing, selling, etc., of matter containing such doctrine. But the majority fails to state that this action is condemned only *when and if* the teacher also personally advocates, advises, teaches, etc., the necessity or propriety of adopting such doctrine. This places this subdivision on the same

footing as 1 (a). And the same is true of subdivision 1 (c) where a teacher organizes, helps to organize or becomes a member of an organization which teaches or advocates such doctrine, for scienter would also be a necessary ingredient under our opinion in *Garner, supra.* Moreover, membership is only prima facie evidence of disqualification and could be rebutted, leaving the burden of proof on the State. Furthermore, all of these procedures are protected by an adversary hearing with full judicial review.

In the light of these considerations the strained and unbelievable suppositions that the majority poses could hardly occur. As was said in *Dennis, supra,* "we are not convinced that because there may be borderline cases" the State should be prohibited the protections it seeks. At 516. Where there is doubt as to one's intent or the nature of his activities we cannot assume that the administrative boards will not give him full protection. Furthermore, the courts always sit to make certain that this is done.

The majority says that the Feinberg Law is bad because it has an "overbroad sweep." I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have wilfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or vio-

lence or other unlawful means; or to have wilfully and deliberately printed, published, etc., any book or paper that so advocated *and to have personally* advocated such doctrine himself; or to have wilfully and deliberately become a member of an organization that advocates such doctrine, is prima facie disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is "Yes"!

I dissent.

BERENYI *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 66. Argued December 5–6, 1966.—Decided January 23, 1967.

Petitioner, an alien who entered this country from Hungary in 1956, filed a petition for naturalization in 1962. In connection therewith, he denied under oath that he had been a member of the Communist Party, or that he had been connected or associated with the Party, either directly or indirectly. The Attorney General opposed the petition and at the District Court hearing produced two witnesses whose testimony indicated that petitioner had been a Party member in Hungary. Petitioner denied Party membership and presented witnesses who testified to his opposition to Communism. The District Judge found that petitioner became a Party member in 1945, remained so for a number of years, attended Party meetings, and that petitioner had thus testified falsely in connection with his citizenship application. Since §§ 101 (f) and 316 (a) of the Immigration and Nationality Act provide that an applicant who gives such false testimony is not "a person of good moral character" within the meaning of the Act, and is therefore ineligible for naturalization, the court denied petitioner's citizenship application. The Court of Appeals affirmed. Petitioner seeks reversal of the judgment on the grounds that the factual conclusion of his Party membership was "clearly erroneous," and that the Government failed to establish that his participation in the Party amounted to "meaningful association." *Held:*

1. There is no basis here for disregarding this Court's policy that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. Pp. 635–636.

(a) There was no "very obvious and exceptional" error in the conclusion that petitioner had been a Party member. P. 635.

(b) The policy has particular force when, as here, the resolution of disputed factual issues turns largely on an assessment of the credibility of witnesses who were observed only by the trial court. P. 636.

(c) This Court will not hesitate to undertake independent examination of factual issues when constitutional claims may depend on their resolution, but no constitutional issues are involved here. P. 636.

2. In naturalization proceedings, as distinguished from deportation or denaturalization cases where the Government must prove its case by clear, unequivocal, and convincing evidence, the burden is on the alien to show his eligibility in every respect. Pp. 636–638.

3. The "meaningful association" test for Party members used in deportation cases is not apposite here, since petitioner's application was not denied for Party membership but for falsely answering the question whether he had ever been "in any way connected with, or associated with the Communist Party either directly, or indirectly," a material and relevant question. Pp. 637–638.

352 F. 2d 71, affirmed.

Leon B. Savetsky argued the cause for petitioner. With him on the briefs was *Charles Spar.*

Robert S. Rifkind argued the cause for respondent. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer.*

MR. JUSTICE STEWART delivered the opinion of the Court.

A provision of the Immigration and Nationality Act requires that an alien who applies for naturalization as a United States citizen must establish that during the five years preceding the filing of his petition he has been "a person of good moral character." [1] Another provision

[1] Section 316 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. § 1427 (a), provides:

"No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that

specifies that no applicant may be found to be a person of good moral character who, within that period, "has given false testimony for the purpose of obtaining any benefits" under the Act.[2] The petitioner, an alien who entered this country from Hungary in 1956, filed a petition for naturalization in the United States District Court for the District of Massachusetts in 1962. At the final hearing the Attorney General appeared by counsel in opposition to the petition.[3] Following this hearing the District Judge denied the petition, finding that the petitioner had testified falsely to facilitate his naturalization, and therefore could not, under the law, be found to be a person of good moral character within the statutory period.[4] The Court of Appeals affirmed,[5] and we granted certiorari.[6]

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time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

[2] Section 101 (f), 66 Stat. 172, 8 U. S. C. § 1101 (f):

"For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was— . . . (6) one who has given false testimony for the purpose of obtaining any benefits under this Act . . . ."

[3] Such an appearance is authorized by § 336 (d) of the Act, 66 Stat. 258, 8 U. S. C. § 1447 (d).

[4] 239 F. Supp. 725.

[5] 352 F. 2d 71. The Court of Appeals referred to Rule 52, Fed. Rules Civ. Proc., which provides in relevant part:

"Findings by the Court. (a) Effect. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[6] 384 U. S. 903.

During the preparation of his application to file a petition for naturalization, the petitioner was asked the following question: "Have you ever, in the United States or in any other place, (a) been a member of, or in any other way connected with, or associated with the Communist Party either directly, or indirectly through another organization, group, or person?" The petitioner, under oath, answered "No." On two subsequent occasions during the preliminary proceedings on his petition for naturalization, the petitioner again swore that he had never been a member of the Communist Party.

At the final hearing before the District Judge, the Government produced two witnesses whose testimony indicated that the petitioner had been a member of the Communist Party in Hungary. Dr. Pal Halasz stated that he had known the petitioner when they were both students at the University of Budapest Medical School and had seen the petitioner attend Communist Party meetings there on one or more occasions. While such meetings were sometimes open to persons who were not Party members, and Dr. Halasz was not sure that the petitioner was a Party member, his attendance at Party meetings gave Dr. Halasz the impression that the petitioner was a member. Dr. Gyorgy Kury related that he had attended a study group at the University in September 1948. These groups met to discuss Marxist-Leninist ideology, and students were required to attend regardless of Party membership. One student in each group was responsible for leading this discussion. Dr. Kury testified that, at the meeting in question, the petitioner introduced himself as a member of the Communist Party and the student leader responsible for the group's ideological education. Dr. Kury further testified that the petitioner had told the group that he had become a member of the Communist Party after Soviet troops had occupied Hungary in 1945.

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The petitioner testified that he had never been a Party member or the ideological leader of any student discussion group. He related the heavy pressures on students at the University to attend Party functions and become members, and admitted that these pressures had led him to attend some open Party meetings as a nonmember, but added that he had not been an active participant at these meetings. The petitioner also emphasized his religious upbringing and other factors in his personal life which, he contended, made it unlikely that he would become a Party member. The petitioner's wife testified that he had never been a Party member, and four other witnesses stated that, while in Hungary and after his arrival in the United States, the petitioner had expressed his strong opposition to the Communist Party and the Communist regime in Hungary.

Basing his decision solely on his own evaluation of the testimony adduced at this hearing,[7] the District Judge concluded that the petitioner had become a Party member in 1945 and had remained a member for an indefinite number of years, that the petitioner had attended meetings of the Party, and that he had instructed student study groups in Communist ideology. Accordingly, the court concluded that the petitioner had testified falsely in the preliminary naturalization proceedings, and denied his application for citizenship on the ground that he was, therefore, "not a person of good moral character within

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[7] A preliminary examination on the petitioner's application for citizenship was held before a naturalization examiner, who transmitted his findings and recommendations to the District Judge, all pursuant to § 335 of the Act, 66 Stat. 255, 8 U. S. C. § 1446. But at the final hearing before the District Court, the judge heard testimony and conducted an independent hearing in accordance with § 336 (b) of the Act, 66 Stat. 257, 8 U. S. C. § 1447 (b), and explicitly declined to rely on any of the preliminary examination materials in reaching his conclusion. 239 F. Supp., at 727.

the meaning of the Immigration and Nationality Act." [8]

The petitioner asks us to reject as "clearly erroneous" the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *E. g., Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. For there was no "very obvious and exceptional" error in the conclusion of the two courts below that the petitioner had been a member of the Communist Party. The testimony of Dr. Kury gave a concrete basis for this conclusion, and that of Dr. Halasz lent it further evidentiary support. The conclusion of the courts below is not inconsistent with the possibility that the petitioner may have harbored a strong opposition to the Party which he bared to his friends. For the petitioner may have

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[8] At the same time, the judge found the evidence too weak to establish the Government's alternative contention that the petitioner's application should be denied because he had been a Party member within 10 years preceding his application for citizenship in 1962, and thus came within § 313 of the Act, 66 Stat. 240, 8 U. S. C. § 1424, which provides in relevant part:

"(a) . . . no person shall hereafter be naturalized as a citizen of the United States—

. . . . . .

"(2) who is a member of or affiliated with . . . (D) the Communist or other totalitarian party . . . of any foreign state . . . .

. . . . . .

"(c) The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes."

merely joined the Party as a nominal member in deference to the strong pressures which the Party exerted on students to become members, pressures which several witnesses, including the petitioner himself, recited in detail.

The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution. See, *e. g., Napue* v. *Illinois,* 360 U. S. 264, 271–272; *Fiske* v. *Kansas,* 274 U. S. 380, 385–386. Cf. *Hoffa* v. *United States, ante,* p. 293. But this exceptional doctrine has no application to the present case, for the petitioner makes no claim that any constitutional issues are involved here.

Different considerations do not govern merely because this is a naturalization case. When the Government seeks to strip a person of citizenship already acquired,[9] or deport a resident alien and send him from our shores,[10] it carries the heavy burden of proving its case by "clear, unequivocal, and convincing evidence." [11] But when an

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[9] *Schneiderman* v. *United States,* 320 U. S. 118; *Nowak* v. *United States,* 356 U. S. 660; *Chaunt* v. *United States,* 364 U. S. 350.

[10] *Woodby* v. *Immigration and Naturalization Service, ante,* p. 276.

[11] The Government has not sought to deport the petitioner because of his affiliations with the Communist Party, and to do so it would be required to prove by "clear, unequivocal, and convincing evidence," *Woodby* v. *Immigration and Naturalization Service, supra,* at 286, that the petitioner had been a Party member who was "meaningfully associated" with it, *Rowoldt* v. *Perfetto,* 355 U. S. 115;

alien seeks to obtain the privileges and benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted, cannot lightly be taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect. This Court has often stated that doubts "should be resolved in favor of the United States and against the claimant." *E. g., United States* v. *Macintosh,* 283 U. S. 605, 626.

The petitioner points out that in deportation cases this Court has held that an alien may not be expelled from this country on the ground that he has been a member of the Communist Party unless his participation in the Party amounted to "meaningful association." *Rowoldt* v. *Perfetto,* 355 U. S. 115; *Gastelum-Quinones* v. *Kennedy,* 374 U. S. 469. He contends that the same rule should apply in the context of naturalization, and that the Government's proof in this case failed to establish "meaningful association." But the petitioner's application was not denied because of his Communist Party membership.[12] It was denied because, under oath, he did not tell the truth. The petitioner was not asked whether he had been "meaningfully associated" with the Communist Party. Nor was the inquiry limited to party membership. He was posed the much broader

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Gastelum-Quinones v. *Kennedy,* 374 U. S. 469. The Government's evidence in this case fell clearly short of such a showing. Cf. n. 8, *supra.*

[12] The District Court specifically refused to accept the Government's contention that the petitioner was ineligible for naturalization under the statutory provisions barring Communist Party members from citizenship. See n. 8, *supra.*

question whether he had ever "been a member of, or in any other way connected with, or associated with the Communist Party either directly, or indirectly through another organization, group, or person." The District Court could rightly have found that the petitioner had not told the truth when he answered this question in the negative if he had not been an actual member, or his membership had been only nominal.

Even assuming that an alien may be denied citizenship on the statutory ground of Party membership only when "meaningful association" is shown, the broader question asked of the petitioner was certainly material and relevant. The Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised. The petitioner has never indicated that he was confused or misled by the scope of the question—that he believed at the time it was asked that the question reached only "meaningful association."

We cannot say that the District Court was wrong in finding that the petitioner had failed to tell the truth. It follows that the Court of Appeals was not in error in declining to upset that finding.

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN concur, dissenting.

In this case we are confronted with the spectacle of a person admittedly loyal to the United States, and concededly opposed to communism being denied naturalization because the District Court found that he was not a "person of good moral character." This finding was in turn based upon a subsidiary finding that petitioner had, in the remote past, been a member of the Hungarian Communist Party, and had therefore lied when he stated

that he had never been a member of that Party. The "evidence" upon which the crucial finding of Communist membership was based was slim, ambiguous, and equivocal; and when compared with the overwhelming evidence adduced by petitioner, it is apparent that the finding was *clearly erroneous.*

The Government's case was dependent upon the testimony of two witnesses. Dr. Pal Halasz testified that he had attended medical school in Hungary with petitioner. He did not attend classes with petitioner since he was a number of years behind. The total enrollment of the school was between 1,800 and 2,000. He did not know petitioner socially, but did talk to petitioner and "several times" petitioner helped Halasz with his studies. Halasz was a member of the Communist Party, he "believed" between 1948 and 1956. He could not say how often he attended meetings.[1] According to Halasz, he saw petitioner at some Communist Party meetings, but he did not know how often. He "thought" it was more than once. He did not know what transpired at the meetings, nor did he know whether the particular meetings were *open to nonparty members* or were *open to all.* Most of the meetings were *open to nonparty members and nonmembers were encouraged to attend.* If they did not, they took the risk of retribution. *When nonmembers attended the meetings, they were not identified as nonmembers.* Halasz had never seen petitioner display a membership card, although he had been the doorkeeper at several meetings. He admitted that petitioner was not a "Communist in heart," and that if he said something with respect to communism "it wasn't for the favor of the Communists." He *assumed* that petitioner was a party member because he had seen him at some meetings.

[1] Nor could Halasz remember whether he had made a statement to the Naturalization Service inspector under oath.

The second government witness was Dr. Gyorgy Kury who had been in the same medical class with petitioner for one year. The most that this witness could come up with was that he had attended an ideological indoctrination session required to be attended by all students, *members and nonmembers alike*. At that session, he heard petitioner state that he was the session leader and that he had joined the party after the Soviet occupation of Hungary in 1945. He did not remember who had attended the meeting or exactly what petitioner had said. That was his only contact with petitioner. Except for this one occasion, Kury had never heard petitioner say that he was or had been a Communist.

This was the only evidence the Government adduced to show that petitioner had been a member of the Communist Party. The abundance of evidence produced by petitioner can only be briefly summarized. Petitioner unequivocally testified under oath that he had never been a member of the Communist Party and had never attended a *closed meeting*. He did attend *open meetings* to which he had been invited and at which other non-Communists were present.[2] The invitation was tantamount to an order, and nonattendance would result in serious consequences. Attendance of Berenyi at an *open meeting* is the most that is shown. Plainly that is not sufficient to show that he ever had "been a member of, or in any other way connected with, or associated with the Communist Party"—unless as a part of the cold war technique words are to be turned into traps to catch the innocent. And Kury's vague memory that petitioner had joined the Communist Party is belied by every facet

[2] The difference between the so-called closed meeting and the open meeting is described in the testimony which I have attached as an Appendix to this opinion. From that it appears that nonparty members were invited at times even to closed meetings.

of petitioner's character as revealed by a reading of this record.

During the Hungarian uprising in October and November of 1956, petitioner was a member of the Hungarian Army, which he had joined in order to obtain finances to complete his medical education. Communist membership was not a condition for serving in the army. His unit fought the Russians, and petitioner was on duty treating people who were wounded in fighting.

He married a woman whose family's property had been confiscated by the Communist Government; his wife's family left Hungary to escape the Communist regime. His wife testified that she hated communism and the Communist Government of Hungary.

In 1956, petitioner and his wife fled the Communist regime, making their escape at great personal risk. Petitioner testified without equivocation to his opposition to communism, his loyalty and attachment to the United States and his willingness to fight and bear arms in the defense of this country. He absolutely denied making the statement attributed to him by Kury. After his escape, petitioner resumed his medical career in this country, is associated with a number of hospitals and has been a senior instructor on the staff of the Tufts Medical School.

Petitioner's wife testified that both she and petitioner hated communism and the Hungarian Communist Government, and while in Hungary constantly wanted to leave the country for freedom. Lorand De Bickish, a former Hungarian national who is now a naturalized United States citizen, also testified on petitioner's behalf. De Bickish was an avowed anti-Communist who had been arrested twice and imprisoned once for attempting to escape from the Hungarian Communist Government. He testified that he had been exiled to a small town

in Hungary because his brother was a broadcaster for Radio Free Europe. During his exile, petitioner and his wife were the only people to visit him. Petitioner often voiced his opposition to communism and the Hungarian Government. He and petitioner often secretly listened to Radio Free Europe and the Voice of America, and talked of leaving Hungary and escaping to freedom.

Two other witnesses testified that while in Hungary petitioner had often expressed his opposition to communism and the Hungarian Government and his desire to escape to a free country. They testified that, while in the United States, petitioner frequently expressed his gratitude at being here, and his love for the United States and the freedom it offered. It was stipulated that yet another witness would testify that petitioner opposed communism and was attached to the principles of the Constitution.

Thus we are confronted with the curious proposition that the speculations of one witness, and the hazy memory of another witness as to a statement made in the distant past, can outweigh the overwhelming evidence adduced by petitioner, and thereby prevent his naturalization. To me this is tantamount to saying that the Government can merely throw a very slim doubt into the case, and deny naturalization when the applicant fails to disprove the ephemeral doubt. It is no answer to say that the applicant in a naturalization proceeding bears the burden of showing his eligibility for citizenship. The crucial question is what the applicant must do successfully to bear his burden of persuasion. Nor is it an answer to say that doubts should be resolved in favor of the United States and against the applicant. The question is whether a "doubt" is present to be resolved. Must the applicant tilt with every windmill thrown in his path by the Government? In this case there was no "doubt" to be resolved in the Government's favor. If

the Government's sketchy evidence did raise a doubt, the doubt was clearly dispelled by the overwhelming evidence adduced by petitioner. The petitioner did carry his burden of proof and his burden of persuasion. The concurrent findings of two lower courts are not sacrosanct; the "two court finding" rule is no talisman preventing this Court from exercising the duties with which it is charged. This Court can review concurrent findings where there is "a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. This is such a case.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.

Pal Halasz, the chief witness against petitioner in the District Court, testified as follows:

"Q. Did you ever see a card showing that Dr. Kalman Berenyi was a member of the Communist Party?

"A. No. I never have seen a card.

"Q. Did he ever tell you or admit to you that he was a member of the Communist Party?

"A. No.

"Q. Did he in any way participate in these so-called meetings of any kind?

"A. Yes.

"Q. In what way?

"A. Well, he had to be there.

"Q. Well, other than put his body into a chair and to sit down at that meeting did he do anything else?

"A. I can't recall.

"Q. Now isn't it a fact that there were many noncommunists who were called to these meetings?

"A. Yes.

"Q. And would you say out of a class or group of 40 people, how many would be noncommunists?

"A. I don't know. It depends. Well, from 40 people could be 23 or 24, maybe, not Communists. . . .

"Q. . . . But in this group that you referred to where you claim you saw Dr. Kalman Berenyi how many people would be present?

"A. Well, I would say about 120–150 people.

. . . . . .

"Q. Do you know for a fact, sir, that Kalman Berenyi knew it to be a Communist Party meeting on the occasions when he did attend it, according to your testimony?

"A. You ask me if he knew that was a Communist Party meeting going on. Well, I don't know if he was told or not.

"Q. Now isn't it a fact also that at these so-called meetings indoctrination took place, trying to convert and induce noncommunists to join?

"A. Certainly.

. . . . . .

"Q. Did you ever see a Communist Party book in the possession of Dr. Kalman Berenyi?

"A. No, I did not.

"Q. And did you know from your Party records, if you know of any, that he was listed as a Communist Party member?

"A. I never have seen such a Party record.

"Q. Now, Dr. Halasz, on direct examination you testified that he attended these meetings which you called Communist Party meetings?

"A. Yes.

"Q. Can you tell us with some degree of certainty as to how many meetings you saw Dr. Berenyi at?

"A. No, I can't tell that. Possible I see him maybe two or three times.

"Q. Possibly?

"A. That is all.

"Q. And it could have been once?

"A. It could be more or it could be once?

"Q. You kept no records on it?

"A. No.

"Q. And he was not active in anything? He just sat there?

"A. Oh, he was active, helping the rest of the students to study his medical science.

"Q. But at the so-called meetings once, twice or three times he never said a word, is that right?

"A. No. Unless he was straight asked because it can happen that somebody was asked straight about certain things.

. . . . .

"Q. Do you know now whether Dr. Berenyi attended open or closed meetings?

"A. I can't recall.

"Q. Did you ever have any discussions with Dr. Berenyi concerning his beliefs in Communism or the principles of Communism?

"A. Oh, sometimes certain things came up, certain questions. He didn't say too much; and if he said something, it wasn't for the favor of the Communists.

. . . . .

"Q. And as a result of your talk with Kalman Berenyi, could you tell this Court what his feelings were towards Communism?

"A. I don't believe he was a Communist, even if he was a member of the Communist Party. I don't believe he was Communist in heart.

. . . . .

"Q. Do you assert that he is a member—do you assert that he was a member of the Communist Party?

"A. I thought he was a member of the Communist Party because I have seen him on those certain meetings.

"Q. And that was all you had to base it on?

"A. That is right."

. . . . .

And it appears that even at the so-called "closed party meetings," noncommunists were admitted. For a "closed party meeting" was explained by Halasz to mean "that only the Party members can say anything or vote on any subject:"

"The Court. But it was possible that non-Communists—when I say 'noncommunists,' they who were not members of the Party were present, but if they were present, they were not allowed to speak and they were not allowed to vote, is that right?

"The Witness. That is right, yes."

FLOYD & BEASLEY TRANSFER CO., INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 702. Decided January 23, 1967.

256 F. Supp. 23, affirmed.

John W. Cooper for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.; *Guy H. Postell* for Akers Motor Lines, Inc., et al.; and *Harold Hernly, Robert E. Joyner* and *Ormond Somerville* for Alabama Highway Express, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

SOUTHERN PACIFIC CO. *v.* CITY OF LOS ANGELES ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 797. Decided January 23, 1967.

242 Cal. App. 2d 38, 51 Cal. Rptr. 197, appeal dismissed.

Randolph Karr and *Alan L. Freedman* for appellant.

Roger Arnebergh and *Bourke Jones* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

D'AMICO *v.* NATIONAL BROADCASTING CO. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 805. Decided January 23, 1967.

Appeal dismissed.

Appellant *pro se.*

Howard Monderer for National Broadcasting Co., Inc., and *Solicitor General Marshall* for the United States, appellees.

PER CURIAM.

The motion to dispense with printing the statement as to jurisdiction is granted. The motions to dismiss are also granted and the appeal is dismissed for want of jurisdiction.

McQUAID *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 584, Misc. Decided January 23, 1967.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Walter R. Jones,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

FEIN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 793. Decided January 23, 1967.

18 N. Y. 2d 162, 219 N. E. 2d 274, appeal dismissed and certiorari denied.

Louis Nizer, Paul Martinson and *Bennett Boskey* for appellant.

Frank S. Hogan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

SPROWAL *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 825. Decided January 23, 1967.

Appeal dismissed.

Carl Rachlin for appellant.

Frank S. Hogan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

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PATTERSON ET AL. *v.* CITY OF NEWPORT NEWS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 820. Decided January 23, 1967.

364 F. 2d 816, appeal dismissed and certiorari denied.

PER CURIAM.

The motion to dispense with printing the statement as to jurisdiction is granted. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MAXWELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT.

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI.

No. 1025, Misc. Decided January 23, 1967.

Certiorari granted; order reversed and remanded.

Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Michael Meltsner, George Howard, Jr., and *Anthony G. Amsterdam* for petitioner.

PER CURIAM.

The motion for leave to file the petition for a writ of certiorari and the petition for a writ of certiorari are granted. The order denying petitioner's application for a certificate of probable cause to appeal to the United States Court of Appeals for the Eighth Circuit is reversed and the cause is remanded with directions to issue the certificate.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 650 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1965, THROUGH JANUARY 23, 1967.

Cases Dismissed in Vacation.

No. 340, Misc. Tucker *v.* United States. C. A. 5th Cir. Petition for writ of certiorari dismissed July 28, 1966, pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 251, Misc. Maguire et al. *v.* United States. C. A. 10th Cir. Petition for writ of certiorari dismissed as to petitioner Robert Charles Maguire August 25, 1966, pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 442.

No. 457. Birtcher Corp. *v.* Diapulse Corp. of America et al. C. A. 2d Cir. Petition for writ of certiorari dismissed August 31, 1966, pursuant to Rule 60 of the Rules of this Court. *Gerald G. Kelly* for petitioner. *Edwin J. Freedman* for respondents. Reported below: 362 F. 2d 736.

No. 335, Misc. Luna *v.* Field et al. C. A. 9th Cir. Petition for writ of certiorari dismissed September 29, 1966, pursuant to Rule 60 of the Rules of this Court.

No. 90. Federal Crop Insurance Corp. *v.* Baker et al. Sup. Ct. Ore. (Certiorari granted, 384 U. S. 938.) Writ of certiorari dismissed September 9, 1966, pursuant to Rule 60 of the Rules of this Court. *Solicitor General Marshall* for petitioner. *George H. Corey* for respondents. Reported below: 241 Ore. 609, 407 P. 2d 841.

No. 296, Misc. HOLLINS *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed August 10, 1966, pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 521. STANDARD FRUIT & STEAMSHIP CO. *v.* FULTON, U. S. DISTRICT JUDGE. C. A. 5th Cir. Petition for writ of certiorari dismissed September 27, 1966, pursuant to Rule 60 of the Rules of this Court. *Eberhard P. Deutsch* for petitioner.

No. 338, Misc. LESER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed September 28, 1966, pursuant to Rule 60 of the Rules of this Court. Petitioners *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 313.

OCTOBER 3, 1965.

Assignment Order.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning October 1, 1966, and ending June 30, 1967, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

OCTOBER 10, 1966.

Miscellaneous Orders.

No. —. RODRIGUEZ *v.* NEW YORK. Sup. Ct. N. Y. Application for stay denied. Petitioner *pro se*. *Isidore Dollinger* for respondent.

No. —. SWITCHMEN'S UNION OF NORTH AMERICA, AFL–CIO, ET AL. *v.* SOUTHERN PACIFIC CO. ET AL. C. A. 9th Cir. Motion to treat the application for extension of time as a petition for a writ of certiorari denied. *Clifford D. O'Brien* for petitioners. *Robert Littler, William R. Denton, W. A. Gregory* and *Clifton Hildebrand* for respondents.

No. 27, Orig. OHIO *v.* KENTUCKY.

IT IS ORDERED that the Honorable Phillip Forman, Senior Judge of the United States Court of Appeals for the Third Circuit be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier order herein, see 384 U. S. 982.]

No. 587, Misc. BALDWIN-LIMA-HAMILTON CORP. *v.* JACKSON, ADMINISTRATRIX, ET AL. C. A. 3d Cir. Motion for leave to file petition for writ of certiorari denied. *Michael A. Foley* for petitioner. *B. Nathaniel Richter* for respondents.

No. 3. REDRUP *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. (Certiorari granted, 384 U. S. 916.) Motion of Council for Periodical Distributors Associations, Inc., for leave to participate in the oral argument, as *amicus curiae,* denied. *Morris B. Abram* and *Jay Greenfield* on the motion.

No. 16. AUSTIN *v.* KENTUCKY. Cir. Ct. McCracken County, Ky. (Certiorari granted, 384 U. S. 916.) Motion of Council for Periodical Distributors Associations, Inc., for leave to participate in the oral argument, as *amicus curiae,* denied. *Morris B. Abram* and *Jay Greenfield* on the motion.

No. 29. OSBORN *v.* UNITED STATES. C. A. 6th Cir. (Certiorari granted, 382 U. S. 1023.) Motion of American Civil Liberties Union for leave to file a brief, as *amicus curiae,* granted. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Herman Schwartz* and *Melvin L. Wulf* on the motion.

No. 222. NOWAKOWSKI *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. (Certiorari granted, 384 U. S. 984.) Motion for the appointment of counsel granted, and it is ordered that *Daniel J. O'Hern, Esquire,* of Red Bank, New Jersey, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 252. ENTSMINGER *v.* IOWA. Sup. Ct. Iowa. (Certiorari granted, 384 U. S. 1000.) Motion for the appointment of counsel granted, and it is ordered that *David W. Belin, Esquire,* of Des Moines, Iowa, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 323, Misc. BLACK ET AL. *v.* STRAND ET AL. Motion for leave to file petition for designation of Circuit Judge to act jointly with the Judges of the United States Court of Appeals for the Eighth Circuit in passing upon petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 235, Misc. GREENE *v.* MAY, WARDEN;

No. 255, Misc. VARDEN *v.* HOLMAN;

No. 256, Misc. CAVENY *v.* DOLNICK, CORRECTION COMMISSIONER;

No. 258, Misc. JOHN *v.* FIELD, MENS COLONY SUPERINTENDENT;

No. 301, Misc. BOWENS *v.* CALIFORNIA ADULT AUTHORITY ET AL.;

No. 322, Misc. DEMES *v.* CALIFORNIA;

No. 368, Misc. CEDILLO *v.* UNITED STATES;

No. 378, Misc. SINGLETON *v.* HOLMAN, WARDEN;

No. 395, Misc. BERMAN *v.* WARDEN, MARYLAND PENITENTIARY;

No. 400, Misc. GRESHAM *v.* WILSON, WARDEN, ET AL.;

No. 451, Misc. SESLER *v.* FLORIDA;

No. 481, Misc. TSERMENGAS *v.* KROPP, WARDEN;

No. 512, Misc. GILMER *v.* PEYTON, PENITENTIARY SUPERINTENDENT;

No. 529, Misc. COMBS *v.* UNITED STATES DISTRICT COURT ET AL.; and

No. 531, Misc. WORRELL *v.* THOMAS, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 450, Misc. MCCOY *v.* PRESTON. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 391, Misc. TAYLOR *v.* UNITED STATES. The joint motion to refer this case to the United States District Court for the Eastern District of Virginia granted, and the case is referred to that court for consideration of the settlement agreement. *Elmer B. Gower* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 360 F. 2d 488.

No. 298, Misc. WHITTLE, ADMINISTRATOR *v.* TAWES, GOVERNOR OF MARYLAND. D. C. Md. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Fred Oken*, Assistant Attorney General, for respondent.

No. 146, Misc. HALEY *v.* WILSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *Horace Wheatley*, Deputy Attorneys General, for respondents.

No. 203, Misc. SIMMONS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 230, Misc. MILLS *v.* HOLMAN, WARDEN; and

No. 289, Misc. SANCHEZ *v.* PITCHESS. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 553, Misc. SIMPSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Maxwell Keith* for petitioner. *Moses Lasky* for Union Oil Co. of California, defendant below, in opposition to the motion.

No. 339. HUGHES *v.* WASHINGTON. Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 65, Misc. VANVOLTENBURG *v.* SUPREME COURT OF IOWA ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Lawrence F. Scalise*, Attorney General of Iowa, and *Don R. Bennett*, Assistant Attorney General, for respondents.

No. 244, Misc. CANNON *v.* WILLINGHAM, WARDEN. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 153, Misc. BUCHANAN ET AL. *v.* CONNELL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Richard M. Markus* for petitioners.

No. 449, Misc. DAVIS ET AL. *v.* UNION FREE SCHOOL DISTRICT NO. 7 ET AL. Motion for leave to file petition for writ of mandamus denied. *Murray A. Miller* for petitioners. *Louis J. Lefkowitz*, Attorney General of New York, and *Charles A. Brind* for respondents.

No. 459, Misc. GREER *v.* MORRISON ET AL., JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS. Motion for leave to file petition for writ of mandamus and/or prohibition and for other relief denied. *William E. Gray* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender*, *Larry J. Craddock* and *Lonny F. Zwiener*, Assistant Attorneys General, for respondents.

No. 210, Misc. COLLINS *v.* WILSON, WARDEN;

No. 401, Misc. BRYANS *v.* UNITED STATES;

No. 418, Misc. JOPLIN *v.* BOHANON ET AL.; and

No. 447, Misc. ALLEN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 92. CAMARA *v.* MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. Appeal from Dist. Ct. App. Cal., 1st App. Dist. Probable jurisdiction noted. *Marshall W. Krause, Donald M. Cahen* and *Lawrence Speiser* for appellant. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Gloria F. DeHart,* Deputy Attorney General, for appellee. Reported below: 237 Cal. App. 2d 128, 46 Cal. Rptr. 585.

No. 136. SWANN ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. Motion of John A. Davis et al., for leave to file a brief, as *amici curiae,* granted. Probable jurisdiction noted. *D. P. S. Paul, P. D. Thomson, Neal Rutledge, Richard F. Wolfson, Thomas C. Britton* and *Stuart Simon* for appellants. *Earl Faircloth,* Attorney General of Florida, *Edward D. Cowart* and *Robert A. Chastain,* Assistant Attorneys General, and *Leo L. Foster* for appellees. *David Popper* for Davis et al., as *amici curiae.* Reported below: 258 F. Supp. 819.

No. 180. SEE *v.* CITY OF SEATTLE. Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Case is set for oral argument immediately following No. 92. *Melvin L. Wulf* for appellant. *A. L. Newbould* for appellee. Reported below: 67 Wash. 2d 475, 408 P. 2d 262.

No. 241. NATIONAL BELLAS HESS, INC. *v.* DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS. Appeal from Sup. Ct. Ill. Probable jurisdiction noted. *Archibald Cox, Herman A. Benjamin* and *Julian R. Wilheim* for appellant. *William G. Clark,* Attorney General of Illinois, for appellee. Reported below: 34 Ill. 2d 164, 214 N. E. 2d 755.

Certiorari Granted. (See also No. 143, *ante,* p. 4; and No. 271, *ante,* p. 9.)

No. 101. FEDERAL TRADE COMMISSION *v.* UNIVERSAL-RUNDLE CORP. C. A. 7th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro* and *James McI. Henderson* for petitioner. *Frank C. McAleer* for respondent. Reported below: 352 F. 2d 831.

No. 173. COMMISSIONER OF INTERNAL REVENUE *v.* STIDGER ET UX. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Rogovin, Jack S. Levin, Robert N. Anderson* and *Morton K. Rothschild* for petitioner. Reported below: 355 F. 2d 294.

No. 214. FLEISCHMANN DISTILLING CORP. ET AL. *v.* MAIER BREWING CO. ET AL. C. A. 9th Cir. Certiorari granted. *Moses Lasky* for petitioners. *J. Albert Hutchinson* for respondents. Reported below: 359 F. 2d 156.

No. 249. WALKER ET AL. *v.* CITY OF BIRMINGHAM. Sup. Ct. Ala. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Leroy D. Clark, Arthur D. Shores* and *Orzell Billingsley, Jr.,* for petitioners. *J. M. Breckenridge, Earl McBee* and *William C. Walker* for respondent. Reported below: 279 Ala. 53, 181 So. 2d 493.

No. 209. RAILROAD TRANSFER SERVICE, INC. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. *David Axelrod* and *Amos M. Mathews* for petitioner. *Sydney R. Drebin* for respondents. Reported below: 358 F. 2d 55.

No. 216. NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Marshall, Robert S. Rifkind, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Maxwell H. Herriott, James A. Urdan* and *John L. Waddleton* for Allis-Chalmers Manufacturing Co., and *Joseph L. Rauh, Jr., John Silard* and *Stephen I. Schlossberg* for International Union UAW–AFL–CIO (Locals 248 and 401), respondents. Reported below: 358 F. 2d 656.

No. 233. WALDRON *v.* MOORE-MCCORMACK LINES, INC. C. A. 2d Cir. Certiorari granted. *Theodore H. Friedman* for petitioner. *William M. Kimball* for respondent. Reported below: 356 F. 2d 247.

No. 310. FEDERAL TRADE COMMISSION *v.* JANTZEN, INC. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Turner, Nathan Lewin, Howard E. Shapiro, Charles L. Marinaccio, James McI. Henderson* and *Thomas F. Howder* for petitioner. *Edwin S. Rockefeller, Donald H. Green* and *Joel E. Hoffman* for respondent. Reported below: 356 F. 2d 253.

No. 181. GROSSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted and case set for oral argument immediately following No. 41. *James E. McLaughlin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 358 F. 2d 154.

No. 371. CROWN COAT FRONT CO., INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Edwin J. McDermott* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 363 F. 2d 407.

No. 391. STATE FARM FIRE & CASUALTY CO. ET AL. *v.* TASHIRE ET AL. C. A. 9th Cir. Certiorari granted. *John Gordon Gearin* for petitioners. Reported below: 363 F. 2d 7.

No. 37. CURTIS PUBLISHING CO. *v.* BUTTS. C. A. 5th Cir. Certiorari granted. One and one-half hours allotted for oral argument and case set for oral argument immediately following No. 150. *Herbert Wechsler* and *Philip H. Strubing* for petitioner. *William H. Schroder* and *Robert S. Sams* for respondent. Reported below: 351 F. 2d 702.

No. 206. HOUSTON INSULATION CONTRACTORS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 413. NATIONAL LABOR RELATIONS BOARD *v.* HOUSTON INSULATION CONTRACTORS ASSOCIATION. C. A. 5th Cir. Certiorari granted and cases set for oral argument immediately following Nos. 110 and 111. Cases consolidated and a total of one hour allotted for oral argument. *W. D. Deakins, Jr.*, for petitioner in No. 206 and for respondent in No. 413. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner in No. 413 and for respondent in No. 206. Reported below: 357 F. 2d 182.

No. 334. UNITED STATES *v.* WADE. C. A. 5th Cir. Certiorari granted and case set for oral argument immediately following No. 223. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 358 F. 2d 557.

No. 118. DOMBROWSKI ET AL. *v.* EASTLAND ET AL. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE BLACK took no part in the consideration or decision of this petition. *Arthur Kinoy* and *William M. Kunstler* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for respondents. Reported below: 123 U. S. App. D. C. 190, 358 F. 2d 821.

No. 150. ASSOCIATED PRESS *v.* WALKER. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. and/or Sup. Ct. Tex. Certiorari granted and one and one-half hours allotted for oral argument. *William P. Rogers, Stanley Godofsky* and *Arthur Moynihan* for petitioner. *William Andress, Jr.,* and *Clyde J. Watts* for respondent. Reported below: 393 S. W. 2d 671.

No. 168, Misc. WASHINGTON *v.* TEXAS. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted limited to Question 1 presented by the petition which reads as follows: "1. Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?" Case transferred to appellate docket. *Charles W. Tessmer* and *Emmett Colvin, Jr.,* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, and *Charles B. Swanner* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 400 S. W. 2d 756.

No. 336. TOILET GOODS ASSOCIATION, INC., ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.; and

No. 438. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL. *v.* TOILET GOODS ASSOCIATION, INC., ET AL. C. A. 2d Cir. Certiorari granted and cases set for oral argument immediately following No. 39. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE BRENNAN took no part in the consideration or decision of these petitions. *Edward J. Ross* for petitioners in No. 336. *Solicitor General Marshall* for respondents in No. 336. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, Jerome M. Feit* and *William W. Goodrich* for petitioners in No. 438. Reported below: 360 F. 2d 677.

No. 62, Misc. BOSTICK *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted limited to the jury question. Case transferred to the appellate docket. *Lincoln C. Jenkins, Jr.,* and *Matthew J. Perry* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, *E. N. Brandon,* Assistant Attorney General, and *Randolph Murdaugh* for respondents. Reported below: 247 S. C. 22, 145 S. E. 2d 439.

No. 519, Misc. WHITUS ET AL. *v.* GEORGIA. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument with case No. 253. A total of one hour allotted for oral argument of both cases. *Charles Morgan, Jr.,* for petitioners. *Arthur K. Bolton,* Attorney General of Georgia, and *E. Freeman Leverett,* Deputy Assistant Attorney General, for respondent. Reported below: 222 Ga. 103, 114, 149 S. E. 2d 130.

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No. 73, Misc. CLEWIS *v.* TEXAS. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Reagan H. Legg* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, and *Howard M. Fender,* Assistant Attorney General, for respondent. Reported below: 415 S. W. 2d 654.

No. 352. LEVIN *v.* MISSISSIPPI RIVER FUEL CORP. ET AL.; and

No. 359. ALLEGHANY CORP. ET AL. *v.* MISSISSIPPI RIVER FUEL CORP. ET AL. C. A. 8th Cir. Certiorari granted. Cases are consolidated and a total of two hours is allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions. *Maxwell Brandwen* and *John Lowenthal* for petitioner in No. 352. *Breck P. McAllister* and *William E. Haudek* for petitioners in No. 359. *R. H. McRoberts* and *John H. Hendren* for Mississippi River Fuel Corp. et al., and *Dennis G. Lyons* for Missouri Pacific Railroad Co. et al., respondents in both cases. Reported below: 359 F. 2d 106.

Certiorari Denied. (See also No. 93, *ante,* p. 1; No. 102, *ante,* p. 2; No. 192, *ante,* p. 6; No. 204, *ante,* p. 7; No. 217, *ante,* p. 8; No. 229, *ante,* p. 8; No. 267, *ante,* p. 7; No. 40, Misc., *ante,* p. 13; No. 96, Misc., *ante,* p. 13; No. 134, Misc., *ante,* p. 14; No. 293, Misc., *ante,* p. 14; and Misc. Nos. 146, 203, 230, 289 and 450, *supra.*)

No. 126. UNGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams, Vincent J. Fuller* and *Robert L. Weinberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 357 F. 2d 91.

No. 108. MONASTERSKY *v.* UNITED STATES; and

No. 129. BENTVENA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Kasanof* for petitioner in No. 108. *Jerome Lewis* for petitioners in No. 129. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 357 F. 2d 58.

No. 117. CENTRAL LOUISIANA ELECTRIC CO., INC., ET AL. *v.* RURAL ELECTRIFICATION ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. *Tom F. Phillips, Andrew P. Carter* and *Thomas W. Leigh* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Harvey L. Zuckman* for respondents. Reported below: 354 F. 2d 859.

No. 119. MARSHALL *v.* UNITED STATES; and

No. 120. DEL MONICO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William B. Beirne, A. L. Wirin* and *Fred Okrand* for petitioner in No. 119. *Raymond W. Bergan* for petitioner in No. 120. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 355 F. 2d 999.

No. 130. AMERICAN TRUCK RENTAL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Herman J. Obert* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert N. Anderson* and *Fred E. Youngman* for respondent. Reported below: 355 F. 2d 928.

No. 134. FRANK *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. *Martin N. Whyman* for petitioner. Reported below: 24 App. Div. 2d 909, 264 N. Y. S. 2d 413.

No. 121. PUBLIC UTILITIES COMMISSION OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Mary Moran Pajalich* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Henry Geller* and *John H. Conlin* for the United States et al. Reported below: 356 F. 2d 236.

No. 131. SAGANSKY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Walter J. Hurley* and *Francis J. DiMento* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 358 F. 2d 195.

No. 132. CREE ET AL. *v.* GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND, ET AL.; and

No. 133. MURRAY, TRUSTEE, ET AL. *v.* GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND, ET AL. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioners in No. 132. *Martin J. Scheiman* for petitioners in No. 133. *Thomas B. Finan,* Attorney General of Maryland, and *Robert C. Murphy,* Deputy Attorney General, for respondents Goldstein et al.; *Clayton A. Dietrich* for respondents Mainen et al.; *William L. Marbury* and *Mathias J. DeVito* for respondent Convention of the Protestant Episcopal Church of the Diocese of Maryland; *Morris Rosenberg* for respondent Most Reverend Lawrence J. Shehan; *Marvin Braiterman* for respondent Temple Emanuel of Baltimore; and *George F. Flentje, Jr.,* for respondent Maryland Synod of the Lutheran Church. Reported below: 241 Md. 383, 216 A. 2d 897.

No. 138. SMITH ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin, Jr.,* for petitioners.

No. 135. REGISTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles Fuller Blanchard* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 360 F. 2d 689.

No. 139. DELAWARE SPORTS SERVICE *v.* DIAMOND STATE TELEPHONE CO. ET AL. C. A. 3d Cir. Certiorari denied. *Arthur B. Hanson* and *Henry A. Wise, Jr.*, for petitioner. *William S. Potter* for Diamond State Telephone Co., and *Ruth M. Ferrell*, Deputy Attorney General, for the State of Delaware, respondents. Reported below: 355 F. 2d 929.

No. 140. TASTEE FREEZ INDUSTRIES, INC. *v.* KING-SEELEY THERMOS CO. C. A. 7th Cir. Certiorari denied. *Morris Spector* and *Samuel Lebowitz* for petitioner. *Cyrus G. Minkler* for respondent. Reported below: 357 F. 2d 875.

No. 141. CLARK ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Edward C. Park* and *Philip M. Cronin* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States. Reported below: 358 F. 2d 892.

No. 142. COLONIAL REALTY CORP. *v.* BACHE & CO. C. A. 2d Cir. Certiorari denied. *Spencer Pinkham* for petitioner. *Marvin Schwartz* for respondent. Reported below: 358 F. 2d 178.

No. 144. THOMPSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *F. Lee Bailey* for petitioner. *Robert W. Mattson*, Attorney General of Minnesota, and *William B. Randall* for respondent. Reported below: 273 Minn. 1, 139 N. W. 2d 490.

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No. 145. ROEHNER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Edward T. Roehner*, petitioner, *pro se*. *Lyman M. Tondel, Jr.*, for respondents.

No. 147. BALDWIN-HALL, INC. *v.* NEW YORK. Ct. Cl. N. Y. Certiorari denied. *George R. Fearon* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Ruth Kessler Toch*, Acting Solicitor General, and *Jean M. Coon*, Assistant Attorney General, for respondent. Reported below: See 16 N. Y. 2d 1005, 212 N. E. 2d 899.

No. 148. JONES COAL CO. *v.* UNITED STATES FOR THE USE AND BENEFIT OF JAHN, TRUSTEE. C. A. 6th Cir. Certiorari denied. *Sizer Chambliss* for petitioner. *Richard P. Jahn* for respondent. Reported below: 368 F. 2d 217.

No. 151. HARRIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 358 F. 2d 279.

No. 153. SHARP *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 248 La. 865, 182 So. 2d 517.

No. 154. DOCTOR *v.* UNITED STATES. Ct. Cl. Certiorari denied. *George R. Ruditz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Frederick B. Abramson* for the United States.

No. 155. CREAMER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Edward L. Merrigan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Jack H. Weiner* for the United States. *Elmer Neumann* for Government Employees' Council, AFL–CIO, as *amicus curiae,* in support of the petition. Reported below: 174 Ct. Cl. 408.

No. 156. FISHER, ADMINISTRATRIX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Craig Spangenberg* and *Donald P. Traci* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 706.

No. 157. KOLITCH ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Jacob W. Friedman* for petitioners. *Frank S. Hogan* for respondent.

No. 158. VENTERELLA ET AL., PROPRIETORS OF SUDAN OYSTER CO., ET AL. *v.* PACE, DBA PACE MARINE SERVICE, ET AL. Sup. Ct. La. and/or Ct. App. La., 4th Cir. Certiorari denied. *Thomas Barr III* for petitioners. *John W. Sims, Ernest A. Carrere, Jr.,* and *Benjamin W. Yancey* for respondents. Reported below: 180 So. 2d 240; 248 La. 796, 182 So. 2d 73.

No. 166. GLASSNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Petitioners *pro se. Solicitor General Marshall, Assistant Attorney General Rogovin* and *Robert N. Anderson* for respondent. Reported below: 360 F. 2d 33.

No. 174. SULE *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner.

No. 165. RAY ET UX. *v.* STATE HIGHWAY COMMISSION OF KANSAS. Sup. Ct. Kan. Certiorari denied. *Donald A. Bell* for petitioners. *Robert C. Londerholm*, Attorney General of Kansas, and *Charles N. Henson, Jr.*, and *John H. Morse*, Assistant Attorneys General, for respondent. Reported below: 196 Kan. 13, 410 P. 2d 278.

No. 167. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 356 F. 2d 868.

No. 170. VIRTUE BROS. ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Louis R. Baker* for petitioners. *Harold W. Kennedy, George W. Wakefield* and *John Geyer Tausig* for respondents. Reported below: 239 Cal. App. 2d 220, 48 Cal. Rptr. 505.

No. 172. JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson*, Attorney General of Mississippi, and *Martin R. McLendon*, Assistant Attorney General, for petitioners. *Robert L. Carter, Barbara A. Morris, Jack H. Young* and *Frank D. Reeves* for respondent. Reported below: 357 F. 2d 831.

No. 175. MARK J. GERRY, INC., DBA DOVE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Bernard B. Laven* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 355 F. 2d 727.

No. 169. COLUMBUS McKINNON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Robert M. Hitchcock* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 177. FABIAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Seymour L. Smith* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 358 F. 2d 187.

No. 178. MITCHELL FOODS, INC., ET AL. *v.* RICH PRODUCTS CORP. C. A. 2d Cir. Certiorari denied. *Malcolm K. Buckley* for petitioners. *Ralph L. Chappell* for respondent. Reported below: 357 F. 2d 176.

No. 182. BRUNI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Joseph I. Bulger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 359 F. 2d 802.

No. 184. HURLEY ET AL. *v.* BEECH AIRCRAFT CORP. C. A. 7th Cir. Certiorari denied. *James J. Stewart* for petitioners. *Erle A. Kightlinger* for respondent. Reported below: 355 F. 2d 517.

No. 185. BEDFORD-NUGENT CORP. *v.* CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL UNION No. 215. C. A. 7th Cir. Certiorari denied. *Wells T. Lovett* for petitioner. *Edward J. Fillenwarth* for respondent. Reported below: 358 F. 2d 21.

No. 186. DeSTEFANO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Julius Lucius Echeles* for petitioner.

No. 189. WILLIAMS ET AL. *v.* PACIFIC MARITIME ASSOCIATION ET AL. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Richard Ernst* for respondents.

No. 191. EMERSON INSTITUTE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Byron N. Scott* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 123 U. S. App. D. C. 71, 356 F. 2d 824.

No. 193. HOOVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Luther E. Jones, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 358 F. 2d 87.

No. 194. EQUITABLE PUBLISHING CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Gordon W. Gerber* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Melva M. Graney* for respondent. Reported below: 356 F. 2d 514.

No. 195. CHEMICAL NATURAL RESOURCES, INC., ET AL. *v.* REPUBLIC OF VENEZUELA. Sup. Ct. Pa. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioners. *Howard C. Westwood, William A. Dobrovir* and *Thomas F. Mount* for respondent. Reported below: 420 Pa. 134, 215 A. 2d 864.

No. 196. FRUEHAUF CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Alfons Landa, Raymond C. Cushwa* and *George D. Webster* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Baum* for respondent. Reported below: 356 F. 2d 975.

No. 190. HAGAN *v.* APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA ET AL. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied.

No. 197. MISSISSIPPI POWER CO. ET AL. *v.* SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION. Sup. Ct. Miss. Certiorari denied. *James S. Eaton, Thomas H. Watkins* and *Sherwood W. Wise* for petitioners. *David C. Welch, T. Harvey Hedgepeth* and *John H. Price, Jr.*, for respondent. Reported below: 254 Miss. 754, 183 So. 2d 163.

No. 198. GEVINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edwin Smith* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 358 F. 2d 761.

No. 200. CARBO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William B. Beirne, A. L. Wirin, Fred Okrand* and *Russell E. Parsons* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 357 F. 2d 800.

No. 201. PECK IRON & METAL CO., INC., ET AL. *v.* COLONIAL PIPELINE CO. Sup. Ct. App. Va. Certiorari denied. *Harold J. Goodman* for petitioners. Reported below: 206 Va. 711, 146 S. E. 2d 169.

No. 202. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Julian Hartridge, Jr.*, and *Samuel A. Cann* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 359 F. 2d 67.

No. 199. DAVIS ET AL. *v.* NEGIN, TRUSTEE. C. A. 6th Cir. Certiorari denied. Reported below: 357 F. 2d 154.

No. 203. BREAULT ET AL. *v.* FEIGENHOLTZ ET AL., EXECUTORS AND TRUSTEES, ET AL. C. A. 7th Cir. Certiorari denied. *John J. Yowell* and *G. Kent Yowell* for petitioners. *Hirsch E. Soble, Jacob Shamberg* and *J. Glenn Shehee* for respondents Feigenholtz et al. Reported below: 358 F. 2d 39.

No. 205. MARATHON OIL CO. *v.* HEATH ET AL. C. A. 7th Cir. Certiorari denied. *Craig Van Meter, John H. Armstrong* and *Joseph F. Diver* for petitioner. *John P. Wham* for respondents. Reported below: 358 F. 2d 34.

No. 207. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John F. Dugger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 359 F. 2d 558.

No. 210. CAMPBELL, ADMINISTRATRIX, ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 2d Cir. Certiorari denied. *Edmund H. H. Caddy* and *Milton S. Seligman* for petitioners. *John J. Martin* and *William M. Keegan* for respondent.

No. 212. WALKER PROCESS EQUIPMENT, INC. *v.* FMC CORP. C. A. 7th Cir. Certiorari denied. *Charles J. Merriam* for petitioner. *James W. Clement, Charles W. Ryan* and *Lloyd C. Hartman* for respondent. Reported below: 356 F. 2d 449.

No. 213. LOWE *v.* BAILEY ET UX. Ct. App. Ga. Certiorari denied. *Charles E. Muskett* for petitioner. Reported below: 112 Ga. App. 516, 145 S. E. 2d 622.

No. 215. WEAVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Arthur Abraham* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 360 F. 2d 903.

No. 218. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* CONTINENTAL CASUALTY CO. C. A. 5th Cir. Certiorari denied. *David Arthur Binder* for petitioners. *R. Emmett Kerrigan* and *Edward H. Cushman* for respondent. Reported below: 355 F. 2d 969.

No. 219. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John H. Ruffin, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 352 F. 2d 490.

No. 221. FOGARASCHER ET AL. *v.* FRICKE. Sup. Ct. Ohio. Certiorari denied. *John R. Vintilla* for petitioners. *Ellis V. Rippner* and *Richard W. Schwartz* for respondent.

No. 224. WEBB *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Sizer Chambliss* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 225. SLOMANSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Leonard M. Mendelson* for petitioner. *Harold Kaminsky* for respondent.

No. 226. ROPER ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Harris B. Steinberg* for petitioners. *Frank S. Hogan* for respondent. Reported below: 17 N. Y. 2d 711, 216 N. E. 2d 711.

No. 228. WHEELER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Richard E. Vimont* for petitioner. Reported below: 395 S. W. 2d 565.

No. 230. CIPRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 358 F. 2d 709.

No. 231. WELDON ET AL. *v.* SEMPLE, JUDGE PRO HAC VICE OF THE CIRCUIT COURT OF AUDRAIN COUNTY, ET AL. Sup. Ct. Mo. Certiorari denied. *Lon Hocker* for petitioners.

No. 232. NORDSTROM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joseph A. Maun* and *Lawrence J. Hayes* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 360 F. 2d 734.

No. 234. BRUNI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Joseph I. Bulger* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 807.

No. 236. PEPSI COLA BOTTLING CO. OF PUERTO RICO, INC. *v.* OTERO ET AL. Sup. Ct. P. R. Certiorari denied. *Juan R. Torruella del Valle* and *Stuart Rothman* for petitioner. Reported below: —— P. R. R. ——.

No. 239. PENN TOWNSHIP *v.* YECKO BROS. ET AL. Sup. Ct. Pa. Certiorari denied. *David M. Harrison* for petitioner. *Carmen V. Marinaro* for respondents. Reported below: 420 Pa. 386, 217 A. 2d 171.

No. 237. HIGGINS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Bernard L. Swerland* for petitioner. Reported below: 67 Wash. 2d 147, 406 P. 2d 784.

No. 242. PORTER *v.* PEPSI-COLA BOTTLING CO. OF COLUMBIA ET AL. Sup. Ct. S. C. Certiorari denied. *Henry Hammer* and *Claud N. Sapp* for petitioner. *Eugene F. Rogers* for respondents. Reported below: 247 S. C. 370, 147 S. E. 2d 620.

No. 246. BRUNETTO CHEESE MANUFACTURING CORP. ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 2d Cir. Certiorari denied. *Denis M. Hurley* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *William W. Goodrich* for respondent. Reported below: 356 F. 2d 874.

No. 247. COLUMBUS & GREENVILLE RAILWAY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Robert Ash* and *Carl F. Bauersfeld* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Melva M. Graney* and *Robert A. Bernstein* for respondent. Reported below: 358 F. 2d 294.

No. 257. REDDEN *v.* MURPHY, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. *Ernest Rassner* for petitioner. *J. Lee Rankin* for respondents.

No. 259. POULOS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Cyrus A. Ansary* for petitioner. *Robert C. Londerholm*, Attorney General of Kansas, and *Keith Sanborn* for respondent. Reported below: 196 Kan. 253, 287, 411 P. 2d 689, 694.

No. 238. RAFTER *v.* NEWARK INSURANCE CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Jerome Murray* for respondent. Reported below: 355 F. 2d 185.

No. 243. BRENNAN *v.* SELLERS. C. A. 10th Cir. Certiorari denied. Reported below: 357 F. 2d 150.

No. 255. CITY OF CANTON ET AL. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. *James L. Harkins, Jr.*, for petitioners. *William B. Saxbe*, Attorney General of Ohio, and *J. Philip Redick* and *Langdon D. Bell*, Assistant Attorneys General, for Public Utilities Commission of Ohio, and *Walter J. Milde* for East Ohio Gas Co., respondents. Reported below: 5 Ohio St. 2d 237, 215 N. E. 2d 366.

No. 256. VON HARDENBERG ET AL. *v.* KATZENBACH ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Thomas P. Sullivan* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener* for Katzenbach, and *W. Donald McSweeney* for Northern Trust Co., respondents. Reported below: 65 Ill. App. 2d 253, 212 N. E. 2d 694.

No. 264. CONTRACT CARRIERS, INC., ET AL. *v.* MARKIEWICZ ET AL. C. A. 7th Cir. Certiorari denied. *Aribert L. Young* and *Robert J. Wampler* for petitioners. *Alex M. Clark* for Markiewicz et al., and *Robert S. Smith* and *Wilbert McInerney* for Greyhound Corp. et al., respondents. Reported below: 358 F. 2d 26.

No. 261. RUSKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edward Worton* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 358 F. 2d 737.

No. 260. GIBBONS ET AL. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. *Arthur Abraham* for petitioners. *Sydney R. Drebin* for respondent. Reported below: 34 Ill. 2d 102, 214 N. E. 2d 740.

No. 263. LA PELUSO *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Emma P. Lum* for petitioner. Reported below: 239 Cal. App. 2d 715, 49 Cal. Rptr. 85.

No. 266. COLELLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *David E. Feller* and *Jerry D. Anker* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 360 F. 2d 792.

No. 268. PARTIN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Teddy W. Airhart, Jr.*, for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 356 F. 2d 512.

No. 269. SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, ET AL. *v.* FIRST NATIONAL BANK OF OAKLAND. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Paul N. McCloskey* and *William I. Cohen* for petitioners. Reported below: 240 Cal. App. 2d 109, 49 Cal. Rptr. 358.

No. 278. SCHUTZBANK, CORPORATIONS COMMISSIONER OF CALIFORNIA *v.* ELLIOTT, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, and *Arthur C. De Goede* and *David W. Halpin*, Deputy Attorneys General, for petitioner. *Thomas S. Tobin* for respondent. Reported below: 356 F. 2d 749.

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No. 265. COMINCO PRODUCTS, INC. *v.* OREGON STATE TAX COMMISSION. Sup. Ct. Ore. Certiorari denied. *Clarence D. Phillips* for petitioner. Reported below: 243 Ore. 165, 411 P. 2d 85.

No. 270. GREENWOOD & MAJESTIC CONSTRUCTION CO. *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *Abraham J. Harris* and *Robert E. Sher* for petitioner. *Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 273. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. *Francis M. Shea, Ralph J. Moore, Jr., Edward P. Russell, James W. Hoeland* and *Peter S. Craig* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander, Robert W. Ginnane* and *Fritz R. Kahn* for the Interstate Commerce Commission, *James M. Manire* for the City of Memphis, and *Edward J. Hickey, Jr., James L. Highsaw, Jr., William G. Mahoney* and *William J. Hickey* for Railway Labor Executives' Association, respondents. Reported below: 360 F. 2d 44.

No. 276. MAXFIELD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Clifford L. Ashton* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 360 F. 2d 97.

No. 281. MARGESON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 361 F. 2d 327.

No. 258. SPIEGLE ET UX. *v.* BOROUGH OF BEACH HAVEN. Sup. Ct. N. J. Certiorari denied. *James M. Davis, Jr.*, for petitioners. *Franklin H. Berry* for respondent. Reported below: 46 N. J. 479, 218 A. 2d 129.

No. 279. DAVIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Jack M. Lowery, Jr.*, for petitioner. Reported below: 399 S. W. 2d 711.

No. 280. NEWS SYNDICATE CO., INC. *v.* URBANO. C. A. 2d Cir. Certiorari denied. *James W. Rodgers* for petitioner. Reported below: 358 F. 2d 145.

No. 283. UNION TANK CAR CO. *v.* DRAGOR SHIPPING CORP., FORMERLY WARD INDUSTRIES CORP. C. A. 9th Cir. Certiorari denied. *Thomas C. McConnell* and *Harold C. Warnock* for petitioner. *David J. Levy* for respondent. Reported below: 361 F. 2d 43.

No. 284. BENSON *v.* UNITED STATES;
No. 285. GLACY *v.* UNITED STATES;
No. 287. MCGINNIS *v.* UNITED STATES; and
No. 288. MERSEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John M. Reed* for petitioner in No. 284. *Edward O. Proctor* for petitioner in No. 285. *William T. Griffin* for petitioner in No. 287. *George G. Beckett* for petitioners in No. 288. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro* and *John H. Dougherty* for the United States. Reported below: 361 F. 2d 31.

No. 290. PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS ET AL. *v.* UDALL, SECRETARY OF INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. *Sam A. Crow* for petitioners. *Solicitor General Marshall* for respondents. Reported below: 355 F. 2d 364.

No. 289. MORRIS ET AL. *v.* ATTREAU. C. A. 7th Cir. Certiorari denied. *Sydney R. Drebin* and *Marvin E. Aspen* for petitioners. *Richard F. Levy* for respondent. Reported below: 357 F. 2d 871.

No. 292. ALLEN ET AL., EXECUTRICES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Courtney McGroarty* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert N. Anderson* and *Benjamin M. Parker* for the United States. Reported below: 359 F. 2d 151.

No. 293. CATAPHOTE CORP. *v.* DE SOTO CHEMICAL COATINGS, INC. C. A. 9th Cir. Certiorari denied. *Charles J. Merriam* for petitioner. *Dugald S. McDougall* and *Carl Hoppe* for respondent. Reported below: 356 F. 2d 24.

No. 294. LEVY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Moss* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 295. MILK DRIVERS & DAIRY EMPLOYEES LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* OLD DUTCH FARMS, INC. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioner. *Herbert L. Maltinsky* for respondent. Reported below: 359 F. 2d 598.

No. 313. BURNETT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Otis Bain Gary* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Gilbert E. Andrews* and *Fred E. Youngman* for respondent. Reported below: 356 F. 2d 755.

No. 296. MASTERSON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph Goldberg* for petitioners. *Solicitor General Marshall* for the United States.

No. 298. HALKO *v.* ANDERSON. C. A. 3d Cir. Certiorari denied. *John J. Krafsig, Jr.*, for petitioner. *Ruth M. Ferrell*, Deputy Attorney General of Delaware, for respondent. Reported below: 359 F. 2d 435.

No. 301. LIPSHUTZ, EXECUTRIX, ET AL. *v.* MAZER, ADMINISTRATOR. C. A. 3d Cir. Certiorari denied. *Sanford D. Beecher* for petitioners. *Robert M. Bernstein* for respondent. Reported below: 360 F. 2d 275.

No. 303. VAN WAGENBERG *v.* VAN WAGENBERG. Ct. App. Md. Certiorari denied. *Raymond S. Smethurst, Jr.*, for petitioner. *Eric M. Javits* for respondent. Reported below: 241 Md. 154, 215 A. 2d 812.

No. 307. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 308. LOUISIANA GAS SERVICE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. *Joseph H. Kavanaugh* for petitioner in No. 307. *Andrew P. Carter* and *Walter J. Suthon III* for petitioners in No. 308. *Solicitor General Marshall, Richard A. Solomon* and *Howard E. Wahrenbrock* for the Federal Power Commission, and *Thomas M. Knebel* and *Garner W. Green* for Willmut Gas & Oil Co., respondents in both cases. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *J. Arthur Sandlin, Linward Shivers* and *C. Daniel Jones, Jr.*, Assistant Attorneys General, for the State of Texas et al., as *amici curiae*, in support of the petition in No. 307. Reported below: 359 F. 2d 525.

No. 309. TRAVERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Edgar L. Kelley* and *Walter J. Hurley* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 361 F. 2d 753.

No. 312. MOUNT VERNON FIRE INSURANCE CO. *v.* HIGHWAY TRAILER CO. Sup. Ct. N. J. Certiorari denied. *Edward G. D'Alessandro* for petitioner. *Charles N. Kors* for respondent. Reported below: 46 N. J. 442, 217 A. 2d 617.

No. 315. DEANGELIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Walter D. Van Riper* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 361 F. 2d 788.

No. 317. WIENRANK ET AL. *v.* NORTHERN ILLINOIS GAS CO. App. Ct. Ill., 3d Dist. Certiorari denied. *John Alan Appleman* for petitioners. *Justin A. Stanley* and *James E. Knox, Jr.*, for respondent. Reported below: 66 Ill. App. 2d 60, 213 N. E. 2d 411.

No. 318. ZIAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Raymond J. Smith* and *Edward J. Calihan, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 360 F. 2d 850.

No. 322. BAXTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Ronald Goldfarb* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 361 F. 2d 116.

No. 314. CHRISTIANA *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Jack Wasserman, David Carliner* and *G. Wray Gill, Sr.*, for petitioner. Reported below: 249 La. 247, 186 So. 2d 580.

No. 324. ALTIERI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Jacob J. Alprin* and *Ralph C. DeLuca* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for the United States.

No. 325. BUTLER *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. *Donald S. Eisenberg* for petitioner. *Bronson C. La Follette*, Attorney General of Wisconsin, and *William A. Platz*, Assistant Attorney General, for respondent. Reported below: 360 F. 2d 118.

No. 327. RICKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Meyer Rothwacks* and *John M. Brant* for the United States. Reported below: 360 F. 2d 32.

No. 331. TAFT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Samuel S. Mitchell* and *Romallus O. Murphy* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 360 F. 2d 213.

No. 333. MAMIYE BROS. ET AL. *v.* BARBER STEAMSHIP LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Vincent L. Leibell, Jr.*, for petitioners. *David P. H. Watson* for respondent shipowners et al., and *Eli Ellis* for respondents Atlantic Stevedoring Co., Inc., et al. Reported below: 360 F. 2d 774.

No. 335. PRATT ET AL. *v.* MASSACHUSETTS; and

No. 383. FARRELL ET AL. *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. *Edward Bennett Williams, Raymond W. Bergan* and *William T. Kirby* for petitioners in No. 335. *Donald S. Dawson* for petitioners in No. 383. *Edward W. Brooke,* Attorney General of Massachusetts, and *Brian E. Concannon,* Special Assistant Attorney General, for respondent.

No. 337. GREENHILLS HOME OWNERS CORP. *v.* VILLAGE OF GREENHILLS ET AL. Sup. Ct. Ohio. Certiorari denied. *Charles P. Taft* for petitioner. *Ambrose H. Lindhorst* for respondents. Reported below: 5 Ohio St. 2d 207, 215 N. E. 2d 403.

No. 338. FISCHBEIN *v.* BROOKLYN BAR ASSOCIATION. Ct. App. N. Y. and/or App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Philip D. Vitiello* for petitioner. *Benjamin R. Raphael* for respondent.

No. 340. FERNICOLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Michael A. Querques* and *Albert H. Greene* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for the United States. Reported below: 361 F. 2d 864.

No. 348. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 344. EVANS *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. *Theodore Lockyear* for petitioner. *Thomas M. Scanlon* for respondent. Reported below: 359 F. 2d 822.

No. 329. SCHWANER *v.* O'DONNELL, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *Lydon Beam* for petitioner.

No. 346. VON DER AHE VAN LINES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Alan F. Wohlstetter* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 175 Ct. Cl. 281, 358 F. 2d 999.

No. 347. SWACKER ET AL. *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. *Joseph M. Kuczko* for petitioners. *Jerome Ackerman* for respondent. Reported below: 360 F. 2d 420.

No. 349. FORESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 350. REPUBLIC OF CUBA ET AL. *v.* FLOTA MARITIMA BROWNING DE CUBA, S. A. C. A. 4th Cir. Certiorari denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioners. *William A. Grimes* for respondent. Reported below: 363 F. 2d 733.

No. 351. KAELIN *v.* UNIVERSITY OF PITTSBURGH ET AL. Sup. Ct. Pa. Certiorari denied. *Donald E. Rohall* for petitioner. *Charles C. Arensberg* and *B. A. Karlowitz* for respondents. Reported below: 421 Pa. 220, 218 A. 2d 798.

No. 355. MEYER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William M. Giffin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 359 F. 2d 837.

No. 353. LEWIS *v.* CITY OF GRAND RAPIDS ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Wendell A. Miles* for respondents. Reported below: 356 F. 2d 276.

No. 357. SMITH ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Carl Rachlin* and *Albert X. Bader* for petitioners. Reported below: 46 N. J. 510, 218 A. 2d 147.

No. 361. NINNEMAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Frederick H. Wagener* for petitioner. Reported below: 179 Neb. 729, 140 N. W. 2d 5.

No. 362. SIMON *v.* LANDRY ET AL. C. A. 5th Cir. Certiorari denied. *J. Minos Simon*, petitioner, *pro se*. Reported below: 359 F. 2d 67.

No. 364. WOLFE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. *E. E. Wolfe, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for respondent. Reported below: 124 U. S. App. D. C. 45, 361 F. 2d 62.

No. 365. AMBROSE DISTRIBUTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Eli A. Weston* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Elliott Moore* for respondent. Reported below: 358 F. 2d 319.

No. 369. GODEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *E. Waller Dudley* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 361 F. 2d 21.

No. 368. Sheet Metal Workers' International Union, AFL–CIO, Local Union 17 *v.* Aetna Steel Products Corp. et al. C. A. 1st Cir. Certiorari denied. *Edward J. Hickey, Jr., William G. Mahoney* and *Joseph F. Feeney* for petitioner. *Oswald Vischi, Sidney O. Raphael* and *William T. Glover* for respondents. Reported below: 359 F. 2d 1.

No. 376. United States for the Use and Benefit of Keller Pier Drilling Co. *v.* John H. Eisele Co., Inc., et al. C. A. 6th Cir. Certiorari denied. *Thomas F. Lazaron, Herbert Bass* and *Ernest V. Thomas* for petitioner.

No. 377. Beto, Corrections Director *v.* Welch. C. A. 5th Cir. Certiorari denied. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, for petitioner. *Robert L. Doss* and *Charles Alan Wright* for respondent. Reported below: 355 F. 2d 1016.

No. 380. Lopez *v.* United States Department of Justice, Immigration and Naturalization Service. C. A. 3d Cir. Certiorari denied. *Francis T. Anderson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 356 F. 2d 986.

No. 385. Norton *v.* Campbell, Governor of New Mexico, et al. C. A. 10th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Boston E. Witt,* Attorney General of New Mexico, and *Myles E. Flint,* Assistant Attorney General, for respondents. Reported below: 359 F. 2d 608.

No. 358. VASSOS *v.* ORNSTEIN, EXECUTRIX, ET AL. Ct. App. N. Y. Certiorari denied. *Jacob Rassner* for petitioner. *William F. Martin* for Ornstein, and *Martin Fogelman* for Sarot, respondents.

No. 387. MAGEE ET AL. *v.* LANE. Sup. Jud. Ct. Mass. Certiorari denied. *Timothy J. McInerney* for petitioners. *David L. Whitney* for respondent. Reported below: 350 Mass. 781, 216 N. E. 2d 565.

No. 389. INSURANCE CO. OF NORTH AMERICA *v.* KEELING. C. A. 5th Cir. Certiorari denied. *Finis E. Cowan* for petitioner. *Herbert L. Morgan* and *Carl Dudensing* for respondent. Reported below: 360 F. 2d 88.

No. 403. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 81.

No. 404. VILLAFRANCA ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Gordon Davidson* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Baum* for respondent. Reported below: 359 F. 2d 849.

No. 407. NEELY *v.* HOUSTON OILERS, INC. C. A. 10th Cir. Certiorari denied. *Angus G. Wynne, James D. Fellers* and *J. Howard Edmondson* for petitioner. *Gus Rinehart* and *William D. Deakins, Jr.*, for respondent. Reported below: 361 F. 2d 36.

No. 414. KYLES *v.* PRESTON, JAIL SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied. *Andrew W. Carroll* for petitioner. *Solicitor General Marshall* for respondents.

No. 388. KING *v.* VICO INSURANCE CO. OF ST. LOUIS. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner. *William A. Porteous, Jr.*, for respondent.

No. 406. WOJTON, AKA GURAL *v.* SANTELLA ET AL., T/A HOMESTEAD CONSTRUCTION CO. Sup. Ct. N. J. Certiorari denied. *Frank B. Bozza* for petitioner. *Matthew D. F. Wade* for respondents.

No. 408. BILLINGSLEY ET AL. *v.* CLAYTON, PRESIDENT OF THE JURY BOARD OF JEFFERSON COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. *Charles Morgan, Jr., Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., Melvin L. Wulf, Jack Greenberg* and *Norman Amaker* for petitioners. *Richmond M. Flowers*, Attorney General of Alabama, and *Leslie Hall*, Assistant Attorney General, for respondents. Reported below: 359 F. 2d 13.

No. 409. RUMMLER *v.* SPELIO. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied.

No. 415. ARUNDEL SUPPLY CORP. *v.* DOVELL ET AL. C. A. D. C. Cir. Certiorari denied. *William A. Ehrmantraut* for petitioner. Reported below: 124 U. S. App. D. C. 89, 361 F. 2d 543.

No. 416. ZERO MANUFACTURING CO., INC. *v.* MISSISSIPPI MILK PRODUCERS ASSOCIATION. C. A. 5th Cir. Certiorari denied. *Penrose Lucas Albright* for petitioner. *Edmund C. Rogers* for respondent. Reported below: 358 F. 2d 853.

No. 422. PLATA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 361 F. 2d 958.

No. 419. DEALESANDRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* and *H. Elliot Wales* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony Nugent* for the United States. Reported below: 361 F. 2d 694.

No. 425. BANE *v.* SUPERINTENDENT OF BOSTON STATE HOSPITAL. Sup. Jud. Ct. Mass. Certiorari denied. Petitioner *pro se*. *Edward W. Brooke*, Attorney General of Massachusetts, and *Willie J. Davis*, Assistant Attorney General, for respondent. Reported below: 350 Mass. 637, 216 N. E. 2d 111.

No. 427. BREWTON FASHIONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Marshall C. Berger* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 361 F. 2d 8.

No. 432. GRAVES, DBA MICHIANA MILLS *v.* KELL-DOT INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. *Marmaduke A. Hobbs* and *Thomas E. Scofield* for petitioner. *Gordon D. Schmidt* for respondents. Reported below: 361 F. 2d 25.

No. 434. CAMPOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 452. CARGO SHIPS & TANKERS, INC. *v.* RUSH. C. A. 2d Cir. Certiorari denied. *John R. Sheneman* for petitioner. *George J. Engelman* for respondent. Reported below: 360 F. 2d 766.

No. 85. PLACID OIL CO. ET AL. *v.* UNION PRODUCING CO. ET AL. Sup. Ct. La. and/or Ct. App. La., 1st Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William D. Rogers* for petitioners. *J. Mort Walker, Jr.*, and *John T. Guyton* for respondents. *Solicitor General Marshall* for the United States, as *amicus curiae*. Reported below: 178 So. 2d 392; 248 La. 447, 179 So. 2d 432.

No. 304. AMERICAN AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Howard C. Westwood, William H. Allen, Edward J. Grenier, Jr., Carl S. Rowe, Warren E. Baker, H. Templeton Brown* and *Robert L. Stern* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Frederic D. Houghteling* for the Civil Aeronautics Board, and *Frederick A. Ballard* and *Cecil A. Beasley, Jr.*, for Slick Corp., respondents. *R. S. Maurer, Robert Reed Gray, Herman F. Scheurer, Jr., C. Edward Leasure, Henry E. Foley, Emory T. Nunneley, Hubert A. Schneider* and *Dominic P. Renda* for certain air carriers, as *amici curiae*, in support of the petition. Reported below: 123 U. S. App. D. C. 310, 359 F. 2d 624.

No. 390. NEW YORK CENTRAL RAILROAD CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Karl J. Stipher, Paul A. Porter* and *Dennis G. Lyons* for petitioners. *John J. Dillon*, Attorney General of Indiana, *Lloyd C. Hutchinson* and *James B. Droege*, Deputy Attorneys General, and *James E. Noland* for respondents. Reported below: —— Ind. ——, 216 N. E. 2d 716.

No. 188. JORDAN, SECRETARY OF STATE OF CALIFORNIA *v.* WEAVER ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Thomas C. Lynch*, Attorney General of California, *Edsel W. Haws* and *Brian R. Van Camp*, Deputy Attorneys General, and *Charles A. Barrett*, Assistant Attorney General, for petitioner. *Powell Pierpoint* for respondents. *Herman F. Selvin* for Fox West Coast Theatres Corp., as *amicus curiae*, in support of the petition. *Pierce Works* and *Warren M. Christopher* for International Telemeter Corp., as *amicus curiae*, in opposition to the petition. Reported below: 64 Cal. 2d 235, 411 P. 2d 289.

No. 106. TURNEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James L. Sloan* for petitioner. *Bruce Bennett*, Attorney General of Arkansas, and *Russell J. Wools*, Chief Assistant Attorney General, for respondent. Reported below: 239 Ark. 851, 395 S. W. 2d 1.

No. 107. CHAMBERLAIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stewart R. Jaffy* for petitioner. *Rex Larson* and *William F. McKee* for respondent.

No. 112. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. *Albert Sidney Johnston, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 356 F. 2d 261.

No. 160. FLORIDA EX REL. FARBER *v.* WILLIAMS, JUDGE; and

No. 161. FLORIDA EX REL. MOLIVER *v.* WILLIAMS, JUDGE. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Herbert A. Warren, Jr.*, and *Hilton R. Carr, Jr.*, for petitioners. Reported below: No. 160, 183 So. 2d 537; No. 161, 183 So. 2d 540.

No. 302. FINE ET AL. *v.* WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Roger F. Turner* and *Bernard G. Sykes* for petitioners. *Laurence S. Fordham* for respondent Woods Hole, Martha's Vineyard & Nantucket Steamship Authority. Reported below: 350 Mass. 775, 215 N. E. 2d 776.

No. 384. MAZEWSKI *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. Reported below: 359 F. 2d 940.

No. 137. LEJEUNE *v.* LOUISIANA. Sup. Ct. La. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. *A. Robert Theibault* for petitioner. Reported below: 248 La. 682, 181 So. 2d 392.

No. 381. POWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. *E. Hugh Cunningham, Jr.*, for petitioner. Reported below: 184 So. 2d 866.

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No. 179. ATLAS SCRAPER & ENGINEERING CO. *v.* PURSCHE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *R. Welton Whann* for petitioner. *Lewis E. Lyon* and *John B. Young* for respondent. Reported below: 357 F. 2d 296.

No. 297. DEESEN *v.* PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *J. Albert Hutchinson* for petitioner. *Thurman Arnold* for respondents. Reported below: 358 F. 2d 165.

No. 146. DELANEY *v.* UNITED SERVICES LIFE INSURANCE CO. C. A. 5th Cir. Motion to strike portions of respondent's brief and appendix denied. Certiorari denied. *Horace P. Shelton, Jr.*, for petitioner. *Bond Davis* for respondent. Reported below: 358 F. 2d 714.

No. 163. EDLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Eugene Gressman* and *Edward L. Genn* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 337 F. 2d 180.

No. 162. NYYSSONEN, ADMINISTRATRIX *v.* BENDIX CORP. C. A. 1st Cir. Motion to use the record in No. 260, October Term, 1965, granted. Certiorari denied. *David Rines* and *Robert H. Rines* for petitioner. *Morris Relson* for respondent. Reported below: 356 F. 2d 193.

No. 379. MUCKLESHOOT TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied. *Frederick W. Post* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Elizabeth Dudley* for the United States.

No. 272. GILBERT *v.* SUPREME COURT OF NEW YORK, CRIMINAL TERM, COUNTY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Arnold Bauman* for petitioner. *Frank S. Hogan* for respondents.

No. 208. CHICAGO CUTTER-KARCHER, INC. *v.* MALEY, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Motion of Consolidated Millinery Co. for leave to file brief, as *amicus curiae*, granted. Certiorari denied. *Victor Packman* for petitioner. *Norman H. Nachman* for respondent. *Alex Elson* for Consolidated Millinery Co., as *amicus curiae*, in support of the petition. Reported below: 356 F. 2d 456.

No. 286. ALABAMA-TENNESSEE NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Motion of Tennessee Valley Municipal Gas Association to be added as a party respondent granted. Certiorari denied. *Stanley M. Morley* and *Francis H. Caskin* for petitioner. *Solicitor General Marshall, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for Federal Power Commission, and *Reuben Goldberg* for Tennessee Valley Municipal Gas Association, respondents. *Christopher T. Boland, George J. Meiburger* and *Harry L. Albrecht* for Independent Natural Gas Association of America, as *amicus curiae*, in support of the petition. Reported below: 359 F. 2d 318.

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No. 306. SANTANA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioners. *Solicitor General Marshall* for the United States.

MR. JUSTICE BLACK, dissenting.

I would grant these petitioners' application for certiorari. They have been sentenced from 4 to 15 years' imprisonment in the penitentiary under these alleged circumstances. After months of negotiations between petitioners and the United States Attorney, he agreed to recommend certain minimum sentences if petitioners would plead guilty. Petitioners agreed, pleaded guilty, and the United States Attorney recommended the minimum sentences as promised. But when the first petitioner appeared for sentencing before a different judge, that judge imposed a sentence in excess of that recommended by the United States Attorney. That petitioner then immediately sought to withdraw his guilty plea, and the others, apparently seeing the handwriting on the wall, immediately moved to withdraw their pleas or adjourn their sentencing. Not only did the judge deny these motions and proceed to sentence the remaining petitioners, but, according to petitioners, he refused even to entertain these motions and to hear argument thereon. Petitioners then filed timely notices of appeal. But their counsel failed to file their trial court records in the Court of Appeals within 40 days of giving such notices of appeal as required by Fed. Rule Crim. Proc. 39 (c). Some three weeks after this time had expired, the Government moved to dismiss the appeals, and though petitioners' counsel then promised to docket the appeals within 10 days and to file briefs within 30, the Court of Appeals dismissed for want of prosecution. This was done in spite of counsel's explanation that the delay was due to counsel's inability more quickly to determine what type of post-conviction remedy to pursue and counsel's assurance, by

allegation of the above facts, that there were substantial legal questions involved.

Regardless of the truthfulness of their allegations, petitioners were denied any opportunity to substantiate them because their appeals were dismissed before their lawyers could file their appeal papers. Thus this case is added to a growing list of cases in which the Federal Rules have been utilized to deprive a litigant of his day in court simply because his lawyer has failed to file some paper within the time specified by the Rules. See, *e. g.*, *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 352 F. 2d 460, cert. denied, 384 U. S. 1004 (dissenting opinion of BLACK, J.); *Lord* v. *Helmandollar*, 121 U. S. App. D. C. 168, 348 F. 2d 780, cert. denied, 383 U. S. 928, BLACK, J., dissenting; *Riess* v. *Murchison*, cert. denied, 383 U. S. 946, BLACK, J., dissenting; *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636, BLACK, J., joined by THE CHIEF JUSTICE, dissenting.

I have always thought that where a litigant's money or property is at stake in a civil case, "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz* v. *Hilton Hotels Corp.*, 383 U. S. 363, 373. I have no doubt that this is true in a criminal case where a litigant's liberty is in issue. The Criminal Rules "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. Rule 2 begins with the admonition that '[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'" *Fallen* v. *United States*, 378 U. S. 139, 142. There is no provision in the Rules making dismissal of an appeal mandatory for failure to file the record within the time prescribed

by Rule 39 (c). The Court of Appeals acquired jurisdiction upon petitioners' filing their notices of appeal, and Rule 45 (b) expressly empowered that court "at any time in its discretion" to permit the late filing of a record if the failure to file it on time "was the result of excusable neglect."

Here I think there has been an obvious, unexcusable failure to exercise that discretion reposed in judges to administer the Rules in the interest of "the just determination of every criminal proceeding." Petitioners may languish in prison for many years, not because their appeals were without merit, but because, through no apparent fault on their part, their lawyers were three weeks late in seeking to file their appeal papers. Since petitioners were never released on bail pending appeal, I fail to see how the Government could be prejudiced by this short delay or how—consistent with the public's interest in the fair administration of criminal justice—it could have any interest in assuring that petitioners' appeals be disposed of other than on the merits. I would reverse and remand these cases to the Court of Appeals for a decision on the merits of petitioners' allegations.

No. 320. ILLINOIS POWER CO. *v.* LOCAL UNION NO. 51, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 7th Cir. Motion to vacate the judgment and dismiss the complaint as moot denied. Certiorari denied. *Herbert A. Friedlich* and *Stuart Bernstein* for petitioner. *Stanley Ries Schuchat* for respondent. Reported below: 357 F. 2d 916.

No. 20, Misc. MUZA *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, for respondents.

No. 311. CAMPBELL, CIRCUIT CLERK AND REGISTRAR OF SUNFLOWER COUNTY, MISSISSIPPI, ET AL. *v.* HAMER ET AL. C. A. 5th Cir. Motion to dispense with printing respondents' brief in opposition granted. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Joe T. Patterson*, Attorney General of Mississippi, and *Will S. Wells* and *Peter M. Stockett, Jr.*, Assistant Attorneys General, for petitioners. *Morton Stavis* for respondents. Reported below: 358 F. 2d 215.

No. 321. MCCULLOCH, AUDITOR OF POLK COUNTY, ET AL. *v.* KRUIDENIER ET AL. Sup. Ct. Iowa. Certiorari denied, it appearing that the judgment of the Supreme Court of Iowa rests upon an adequate state ground. *Lawrence F. Scalise*, Attorney General of Iowa, and *Timothy McCarthy*, Solicitor General, for petitioners. *David W. Belin* for respondents. Reported below: 258 Iowa 1121, 142 N. W. 2d 355.

No. 392. H. K. PORTER CO., INC., DISSTON DIVISION-DANVILLE WORKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Donald C. Winson* and *Bartholomew A. Diggins* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Elliott Moore* for the National Labor Relations Board, and *Bernard Kleiman, Elliot Bredhoff* and *Michael Gottesman* for United Steelworkers of America, AFL–CIO, respondents. Reported below: 124 U. S. App. D. C. 143, 363 F. 2d 272.

No. 400. SAVERIO *v.* CARTER. Sup. Ct. Tenn. Motion to dispense with printing respondent's brief in opposition granted. Certiorari denied. *E. C. Yokley* for petitioner.

No. 373. SYLVANIA ELECTRIC PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Motion of the Chamber of Commerce of the United States for leave to file brief, as *amicus curiae*, granted. Certiorari denied. *Gerard D. Reilly* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison* for the National Labor Relations Board, and *Irving Abramson, Ruth Weyand* and *Marilyn G. Rose* for Local 352, International Union of Electrical, Radio & Machine Workers, AFL–CIO, respondents. *James W. Hunt* for the Chamber of Commerce of the United States, as *amicus curiae*, in support of the petition. Reported below: 358 F. 2d 591.

No. 420. SULLIVAN ET AL. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK, believing petitioners were wrongfully denied their constitutional right to a trial by jury, would grant certiorari and reverse the judgment below. *Ruth S. Sullivan* for petitioners. *Solicitor General Marshall, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* for respondent. Reported below: 359 F. 2d 426.

No. 431. BOSS HOTELS CO. *v.* CITY OF DES MOINES ET AL. Sup. Ct. Iowa. Motion of respondent City of Des Moines for damages for delay denied. Certiorari denied. *H. M. Coggeshall* for petitioner. *Philip T. Riley, Donald A. Wine* and *L. J. Dickinson* for respondents. Reported below: 258 Iowa 1372, 141 N. W. 2d 541.

No. 35, Misc. MARTINEZ *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *Jay S. Linderman*, Deputy Attorneys General, for respondent.

No. 25, Misc. MAYER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Petitioner *pro se*. *John T. Gaffney* for respondent. Reported below: 349 Mass. 253, 765, 207 N. E. 2d 686, 208 N. E. 2d 247.

No. 26, Misc. KASTLE *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Robert W. Duggan* for respondent.

No. 28, Misc. NIXON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Marco Loffredo* and *Phillip A. Hubbart* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent. Reported below: 178 So. 2d 620.

No. 41, Misc. NOBLE *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. *Bert L. Overcash* for petitioner. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *Richard H. Williams*, Assistant Attorney General, for respondent. Reported below: 351 F. 2d 673.

No. 42, Misc. PICKETT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 43, Misc. ALICEA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, for respondent.

No. 45, Misc. SIMON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 54, Misc. COLE *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 49, Misc. WIRTSHAFTER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Petitioner *pro se.* *Joseph M. Smith* and *Arlen Specter* for respondent.

No. 47, Misc. PITTMAN ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Marshall Patner* for petitioners. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 33 Ill. 2d 357, 211 N. E. 2d 261.

No. 51, Misc. FOSS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Roger E. Venturi,* Deputy Attorneys General, for respondent.

No. 53, Misc. HUSSEY *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Petitioner *pro se.* *Phil L. Hansen,* Attorney General of Utah, for respondent.

No. 55, Misc. PALMER *v.* BOIES, SHERIFF, ET AL. Sup. Ct. Ariz. Certiorari denied. *Jay Dushoff* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents. Reported below: 99 Ariz. 93, 407 P. 2d 64.

No. 58, Misc. FOGGY *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied. Petitioner *pro se.* *Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents.

No. 60, Misc. JACKSON *v.* PAGE, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied. Petitioner *pro se.* *Charles Nesbitt,* Attorney General of Oklahoma, and *Charles L. Owens,* Assistant Attorney General, for respondents. Reported below: 411 P. 2d 555.

No. 61, Misc. COLBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Frank B. Hester* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 355 F. 2d 550.

No. 63, Misc. MAGEE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci* and *Jackson L. Smith*, Deputy Attorneys General, for respondents.

No. 64, Misc. HYDE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Alfred J. O'Ferrall III*, Assistant Attorney General, for respondent. Reported below: 240 Md. 661, 215 A. 2d 145.

No. 66, Misc. COOPER *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 356 F. 2d 82.

No. 67, Misc. ZUCKER *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Ronald M. George*, Deputy Attorney General, for respondents.

No. 70, Misc. TAYLOR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *Arthur J. Sills*, Attorney General of New Jersey, and *Evan William Jahos*, Assistant Attorney General, for respondent. Reported below: 46 N. J. 316, 217 A. 2d 1.

No. 71, Misc. BELLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Samuel James Lee* and *Thomas G. Sharpe, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 356 F. 2d 437.

No. 72, Misc. BEARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 76, Misc. DIAZ-ROSENDO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 357 F. 2d 124.

No. 78, Misc. BUATTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert P. McNamee* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 350 F. 2d 389.

No. 80, Misc. GEE *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 7th Cir. Certiorari denied. *Harvey L. McCormick* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 355 F. 2d 849.

No. 82, Misc. SISNEROS *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied. Petitioner *pro se*. *Boston E. Witt*, Attorney General of New Mexico, and *Myles E. Flint*, Assistant Attorney General, for respondent.

No. 83, Misc. MATHIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Edward Mosk* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General, for respondent. Reported below: 63 Cal. 2d 416, 406 P. 2d 65.

No. 87, Misc. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 356 F. 2d 680.

No. 89, Misc. POINDEXTER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *George H. Cohen* for respondent. Reported below: 353 F. 2d 524.

No. 90, Misc. CAMBRIDGE ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT. Super. Ct. Wash., Walla Walla County. Certiorari denied. Petitioners *pro se. John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way* and *Lee D. Rickabaugh,* Assistant Attorneys General, for respondent.

No. 92, Misc. MILLS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Marco Loffredo* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *James T. Carlisle,* Assistant Attorney General, for respondent. Reported below: 176 So. 2d 118.

No. 95, Misc. COWAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Michael F. Dillon* for respondent.

No. 86, Misc. COLE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *James E. Kennedy* for respondent. Reported below: 67 Wash. 2d 522, 408 P. 2d 387.

No. 93, Misc. BRYANT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Max P. Flusche, Jr., John D. Cofer* and *Hume Cofer* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener*, Assistant Attorneys General, for respondent. Reported below: 397 S. W. 2d 445.

No. 94, Misc. HOPKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 357 F. 2d 14.

No. 97, Misc. SLIVA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 98, Misc. DIEHL *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Jay S. Linderman*, Deputy Attorney General, for respondent.

No. 99, Misc. DOUGLAS *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 357 F. 2d 320.

No. 100, Misc. WARNER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 101, Misc. DAUGHERTY *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 355 F. 2d 803.

No. 102, Misc. DUNLEAVY *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 103, Misc. WALKER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 104, Misc. REISS *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 105, Misc. LATHAN *v.* BREAKEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 106, Misc. HOWARD *v.* YEAGER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 107, Misc. DOMINGO *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied. *J. Perry Langford* for petitioner. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Andrea Sheridan*, Deputy Attorney General, for respondent.

No. 110, Misc. STINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States.

No. 117, Misc. WILSON *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 108, Misc. STEVENSON *v.* WARDEN, ERIE COUNTY JAIL. C. A. 2d Cir. Certiorari denied.

No. 111, Misc. HEGG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 356 F. 2d 834.

No. 112, Misc. HERNANDEZ *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Rose-Marie Gruenwald*, Deputy Attorney General, for respondent. Reported below: 238 Cal. App. 2d 682, 48 Cal. Rptr. 117.

No. 113, Misc. BERRY *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 114, Misc. ALBERTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Anthony F. Marra* for petitioner. *Frank S. Hogan* for respondent. Reported below: 24 App. Div. 2d 973, 265 N. Y. S. 2d 594.

No. 115, Misc. MARQUARDT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Charles B. Swanner* and *Howard M. Fender*, Assistant Attorneys General, for respondent.

No. 118, Misc. SPEARS *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 119, Misc. BERRY *v.* MCGINNIS, CORRECTIONS COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied.

No. 120, Misc. CHAVEZ *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 121, Misc. MINCHELLA *v.* ESTATE OF SKILLMAN, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 356 F. 2d 52.

No. 122, Misc. HAMPTON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 124, Misc. BLAIR *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 125, Misc. TARVIN *v.* PACIFIC GREYHOUND LINES. Sup. Ct. Cal. Certiorari denied.

No. 127, Misc. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 358 F. 2d 107.

No. 128, Misc. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 356 F. 2d 261.

No. 129, Misc. RATTEN *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 131, Misc. BYNUM *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

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No. 130, Misc. WATTS *v.* DEPARTMENT OF AIR FORCE ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 132, Misc. BALLAY *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 133, Misc. CARUSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Michael A. Querques* and *Daniel E. Isles* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 358 F. 2d 184.

No. 135, Misc. FINLEY *v.* OLIVER, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 137, Misc. WITT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 138, Misc. HATCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 139, Misc. URBANO *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 141, Misc. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George G. McCoy* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 355 F. 2d 799.

No. 142, Misc. HAYS *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 143, Misc. ARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 484.

No. 144, Misc. BRANDT *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 145, Misc. BROWN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 248 La. 520, 180 So. 2d 410.

No. 147, Misc. MCCULLOUGH *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 148, Misc. HORNE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent. Reported below: 356 F. 2d 631.

No. 149, Misc. CUMPIAN *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 150, Misc. INGRAM *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 273 Minn. 356, 141 N. W. 2d 802.

No. 151, Misc. EVANS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States et al. Reported below: 359 F. 2d 776.

No. 152, Misc. PEARSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 24 App. Div. 2d 907, 264 N. Y. S. 2d 405.

No. 154, Misc. DiPALMA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 155, Misc. POSTELL *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 156, Misc. ARNOLD *v.* ARNOLD. Sup. Ct. Cal. Certiorari denied.

No. 159, Misc. WALKER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Melvin L. Wulf* for petitioner.

No. 162, Misc. SHARP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *William Garber* and *Alvin D. Edelson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 163, Misc. MASTERS *v.* STEVENS, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 357 F. 2d 433.

No. 164, Misc. WARD *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 165, Misc. WALKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 397 S. W. 2d 432.

No. 166, Misc. MUELLER *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 175, Misc. STEVENSON *v.* MANCUSI, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 171, Misc. BALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 177, Misc. WALKER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 178, Misc. HURLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 179, Misc. LEACH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 749.

No. 181, Misc. HARRIS *v.* STORIE ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Nathan R. Berke* for respondent Storie, and *Roland C. Davis* for certain other respondents.

No. 182, Misc. OAKES *v.* RUNDLE, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 183, Misc. SIMCOX *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 184, Misc. GASCAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 101.

No. 185, Misc. WHITFIELD ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Sacramento. Certiorari denied.

No. 187, Misc. RAMSEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 399 S. W. 2d 473.

No. 189, Misc. HAIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 357 F. 2d 336.

No. 190, Misc. IN RE JONES. Sup. Ct. Mo. Certiorari denied. *Irl B. Baris* for petitioner. *William H. Billings* for Missouri Bar Advisory Committee.

No. 191, Misc. WILLIAMS *v.* McMANN, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 193, Misc. BOURG *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Robert D. Edwards* for petitioner. Reported below: 248 La. 844, 182 So. 2d 510.

No. 194, Misc. MOORMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George L. Saunders* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 358 F. 2d 31.

No. 196, Misc. ROCHA *v.* MENS COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 197, Misc. SENATORE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 198, Misc. DAVIS *v.* SWENSON. Sup. Ct. Mo. Certiorari denied.

No. 205, Misc. WOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 357 F. 2d 425.

No. 195, Misc. KANZELBERGER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 28 Wis. 2d 652, 137 N. W. 2d 419.

No. 200, Misc. ABSTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 201, Misc. HOWARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 202, Misc. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 211, Misc. ALLISON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 213, Misc. BYNUM *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States et al.

No. 214, Misc. BERNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 360 F. 2d 300.

No. 215, Misc. WEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Harold L. Rock* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 359 F. 2d 50.

No. 216, Misc. VELASQUEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 218, Misc. THORNSBERRY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 400 S. W. 2d 226.

No. 220, Misc. BAILEY *v.* YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN ATLANTA, INC. Ct. App. Ga. Certiorari denied. *G. Seals Aiken* for petitioner. *Harry L. Greene* for respondent. Reported below: 112 Ga. App. 684, 146 S. E. 2d 324.

No. 221, Misc. DAVIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Marshall* for the United States.

No. 222, Misc. WILLIAMS *v.* FIELD. C. A. 9th Cir. Certiorari denied.

No. 227, Misc. BATES *v.* VETERANS ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 228, Misc. SCHAWARTZBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 229, Misc. BROWN *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 232, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 234, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 233, Misc. MORRIS *v.* ROUSOS. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 397 S. W. 2d 504.

No. 237, Misc. FAULKNER *v.* PATUXENT INSTITUTION DIRECTOR. Ct. App. Md. Certiorari denied.

No. 239, Misc. WILLIAMS *v.* HEINZE, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 240, Misc. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 18.

No. 241, Misc. HAMLIN *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 243, Misc. CASADOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 354 F. 2d 688.

No. 246, Misc. CUMMINS *v.* PRICE, WARDEN. Sup. Ct. Pa. Certiorari denied. *Silvestri Silvestri* for petitioner. *Robert W. Duggan* for respondent. Reported below: 421 Pa. 396, 218 A. 2d 758.

No. 247, Misc. COLLIER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 248, Misc. ROBERTS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 253, Misc. GALLEGOS *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 2d 703.

No. 249, Misc. WELLINGTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 250, Misc. CARTER *v.* CITY OF NORFOLK. Sup. Ct. App. Va. Certiorari denied. *Joseph Teck* for petitioner. *Robert Y. Button*, Attorney General of Virginia, and *D. Gardiner Tyler*, Assistant Attorney General, for respondent. Reported below: 206 Va. 872, 147 S. E. 2d 139.

No. 251, Misc. GILES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 358 F. 2d 442.

No. 252, Misc. BENOIT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 402 S. W. 2d 706.

No. 254, Misc. O'CONNOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Alvin D. Edelson* for petitioner. *Solicitor General Marshall* for the United States.

No. 257, Misc. ARELLANES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. *Anthony G. Amsterdam, Melvin L. Wulf* and *Marshall Krause* for American Civil Liberties Union et al., as *amici curiae*, in support of the petition. Reported below: 353 F. 2d 270.

No. 259, Misc. PATTERSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Edgar P. Calhoun*, Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 400 S. W. 2d 743.

No. 260, Misc. CHILCUTT *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 261, Misc. STEBBINS *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 262, Misc. NORRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 263, Misc. SWITZER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 265, Misc. WHITE *v.* FORTE ET AL. C. A. 9th Cir. Certiorari denied.

No. 269, Misc. MITCHELL ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 272, Misc. TYREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 611.

No. 273, Misc. MUNDT ET UX. *v.* ZALUSKEY ET UX. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 276, Misc. MOHLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 360 F. 2d 915.

No. 274, Misc. MAY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 277, Misc. SNEAD *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Certiorari denied. Reported below: 241 Md. 733, 217 A. 2d 102.

No. 278, Misc. DAVIS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Arthur J. Freund* for petitioner. Reported below: 400 S. W. 2d 141.

No. 281, Misc. CREIGHTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 429.

No. 283, Misc. SUMMONS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 285, Misc. WICKHAM *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 286, Misc. AYERS *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 287, Misc. COMBS *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 357 F. 2d 809.

No. 290, Misc. FRANCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 358 F. 2d 946.

No. 291, Misc. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 292, Misc. CAVENY *v.* ALABAMA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 359 F. 2d 787.

No. 294, Misc. COON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 360 F. 2d 550.

No. 297, Misc. CARTER *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 2d 710.

No. 299, Misc. GRUBBS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. *John W. Low* for petitioner.

No. 302, Misc. RYBAR *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 303, Misc. CURRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Walter R. Mansfield* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 358 F. 2d 904.

No. 304, Misc. DEVONEY *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 359 F. 2d 828.

No. 305, Misc. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 308, Misc. HURST *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 309, Misc. SANTANA *v.* SUPREME COURT OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 310, Misc. SWIGER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Robert L. Davis* for petitioner. *Melvin G. Rueger* for respondent. Reported below: 5 Ohio St. 2d 151, 214 N. E. 2d 417.

No. 311, Misc. BELLAMY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *Melvin G. Rueger* for respondent. Reported below: 5 Ohio St. 2d 151, 214 N. E. 2d 417.

No. 312, Misc. MILLER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *Melvin G. Rueger* for respondent. Reported below: 5 Ohio St. 2d 151, 214 N. E. 2d 417.

No. 313, Misc. BEACHEM *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 314, Misc. WALLACE *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 68 Wash. 2d 65, 411 P. 2d 419.

No. 316, Misc. ORSINI *v.* ITALIAN LINE, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE SEDE IN GENOVA. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Carl E. Glock* for respondent. Reported below: 358 F. 2d 735.

No. 317, Misc. BOND *v.* RESOR, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. *Jo V. Morgan, Jr.*, for petitioner. *Solicitor General Marshall* for respondents.

No. 321, Misc. DASKAL *v.* NENA, WARDEN. C. A. 2d Cir. Certiorari denied. *Henry B. Rothblatt* and *Emma A. Rothblatt* for petitioner. Reported below: 361 F. 2d 178.

No. 318, Misc. ALTRUDA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 324, Misc. NOLAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 326, Misc. LARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 310.

No. 327, Misc. MEIER *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *E. Douglas Schwantes* for respondents Querrey et al. Reported below: 356 F. 2d 504.

No. 328, Misc. CATANZARO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Alan F. Leibowitz* for respondent. Reported below: 17 N. Y. 2d 185, 216 N. E. 2d 588.

No. 329, Misc. LUCAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 360 F. 2d 937.

No. 333, Misc. HARRIS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 337, Misc. SMITH *v.* RYAN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for respondent.

No. 334, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 336, Misc. MARKS ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioners.

No. 339, Misc. WELCH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James L. Treece* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 361 F. 2d 214.

No. 341, Misc. WATSON *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 2d 297.

No. 343, Misc. MAGDALENO *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 238 Cal. App. 2d 613, 48 Cal. Rptr. 33.

No. 344, Misc. PIERCE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 34 Ill. 2d 382, 216 N. E. 2d 120.

No. 346, Misc. SMITH *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 359 F. 2d 795.

No. 348, Misc. GROZA *v.* LEMMON. Sup. Ct. Cal. Certiorari denied.

No. 359, Misc. ROBERTS *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Certiorari denied. Reported below: 242 Md. 459, 219 A. 2d 254.

No. 350, Misc. CHRISTIANSEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Leon B. Polsky* for petitioner. Reported below: 25 App. Div. 2d 527, 268 N. Y. S. 2d 991.

No. 352, Misc. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 353, Misc. DELEON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 355, Misc. GRANT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 357, Misc. KING *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 358, Misc. TILLIS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Jack Aaron Ettinger* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, *William E. Eubank*, Chief Assistant Attorney General, and *Gary K. Nelson*, Assistant Attorney General, for respondent. Reported below: 100 Ariz. 91, 412 P. 2d 36.

No. 361, Misc. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 123 U. S. App. D. C. 276, 359 F. 2d 260.

No. 370, Misc. RADFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 361 F. 2d 777.

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No. 360, Misc. LITTLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hal Gerber* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 310.

No. 362, Misc. BRADLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 363, Misc. COMBS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se*. *Michael Juviler* for respondent.

No. 366, Misc. COTA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 369, Misc. CHAFIN *v.* PRATT ET AL. C. A. 5th Cir. Certiorari denied. *G. Seals Aiken* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 358 F. 2d 349.

No. 371, Misc. WHITEHORN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 372, Misc. HINTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States.

No. 373, Misc. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 374, Misc. MASSEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 358 F. 2d 782.

No. 375, Misc. MICHAELS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 377, Misc. HOBBS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 379, Misc. WADLEY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 380, Misc. HALL *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 359 F. 2d 26.

No. 383, Misc. MCCANNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Richard E. Moot* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 384, Misc. YOUNG *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 386, Misc. BONOMO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 359 F. 2d 592.

No. 388, Misc. EVANS *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 392, Misc. ANDERSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Michael F. Dillon* for respondent.

No. 396, Misc. BANTON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 404 S. W. 2d 277.

No. 398, Misc. PADILLA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 399, Misc. ATKINS *v.* MORGAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 404, Misc. GLASER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 405, Misc. STALCUP *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 406, Misc. COPELAND *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 407, Misc. MCKENZIE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 408, Misc. FERNANDERS *v.* WALLACK, WARDEN. C. A. 2d Cir. Certiorari denied. *Donald I. Strauber* for petitioner. Reported below: 359 F. 2d 767.

No. 410, Misc. ANDERSON *v.* TAHASH, WARDEN. Sup. Ct. Minn. Certiorari denied. Reported below: 273 Minn. 499, 142 N. W. 2d 94.

No. 411, Misc. HOARD *v.* DUTTON, ACTING WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 360 F. 2d 673.

No. 412, Misc. DAUGHTRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 415, Misc. GALLAGHER *v.* QUINN ET AL. C. A. D. C. Cir. Certiorari denied. *John W. Cragun* and *Richard A. Baenen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Richard S. Salzman* for respondents. Reported below: 124 U. S. App. D. C. 172, 363 F. 2d 301.

No. 416, Misc. RODGERS *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 419, Misc. GREENWAY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Edgar Parke Reese* for petitioner. *Solicitor General Marshall* for the United States.

No. 420, Misc. WILLIAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 421, Misc. LANDMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 422, Misc. PEARLMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 423, Misc. KEY *v.* PRESTON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Milton D. Korman, Hubert B. Pair* and *David P. Sutton* for respondent.

No. 425, Misc. FREEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Krieger* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 459.

No. 427, Misc. SEBRING *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 354 F. 2d 1000.

No. 430, Misc. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Donald E. Werner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 359 F. 2d 285.

No. 431, Misc. WILLIAMS *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 433, Misc. ESPARZA *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 434, Misc. BARKAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 158.

No. 436, Misc. GOHLKE *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 437, Misc. GRAY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 442, Misc. SCOTT *v.* CROCKER-CITIZENS NATIONAL BANK. Sup. Ct. Cal. Certiorari denied.

No. 452, Misc. GERSHON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 410 P. 2d 563.

No. 444, Misc. PENA *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 453, Misc. GROZA *v.* PREFERRED RISK MUTUAL INSURANCE CO. ET AL. Sup. Ct. Cal. Certiorari denied.

No. 455, Misc. COTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Raymond E. Sutton* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 357 F. 2d 789.

No. 458, Misc. PELLICONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 460, Misc. HARTFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 63.

No. 461, Misc. PERREA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 462, Misc. MANDERSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 463, Misc. SASSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 352 F. 2d 796.

No. 464, Misc. GRAVES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Phill Silver* for petitioner. Reported below: 64 Cal. 2d 208, 411 P. 2d 114.

No. 467, Misc. RAY *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 468, Misc. PEREZ *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 469, Misc. VAN ZANDT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *William H. Lassiter, Jr.*, Assistant Attorney General, for respondent. Reported below: — Tenn. —, 402 S. W. 2d 130.

No. 471, Misc. FAIR *v.* NUCCIO, MAYOR OF TAMPA, ET AL. Sup. Ct. Fla. Certiorari denied.

No. 473, Misc. GLAZEWSKI *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 361 F. 2d 971.

No. 476, Misc. KING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 477, Misc. FRISCHMAN *v.* DENBERG. Ct. App. N. Y. Certiorari denied. *I. Jules Rosen* for petitioner.

No. 478, Misc. GENTRY *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 479, Misc. ARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 364 F. 2d 719.

No. 480, Misc. MABE *v.* PILSON. Sup. Ct. App. Va. Certiorari denied.

No. 487, Misc. RODRIGUEZ *v.* HANCHEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 359 F. 2d 724.

No. 485, Misc. WARNER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 400 S. W. 2d 209.

No. 490, Misc. GRADDY *v.* TESSEL ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Martin M. Baxter* for respondent New York Medical College, Flower Fifth Avenue Hospitals.

No. 491, Misc. MONTELLANO *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 492, Misc. VICTOR *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* for petitioner. *John J. Dillon*, Attorney General of Indiana, and *John F. Davis*, Deputy Attorney General, for respondent. Reported below: — Ind. —, 214 N. E. 2d 645.

No. 493, Misc. DUNN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 357 F. 2d 491.

No. 494, Misc. TRAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 2d 477.

No. 495, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 496, Misc. WEISS *v.* MORGENTHAU, U. S. ATTORNEY. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 355 F. 2d 933.

No. 502, Misc. COMLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 498, Misc. JOLLS *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. *L. Robert Leisner* for petitioner. *Michael F. Dillon* for respondents.

No. 500, Misc. BROWN *v.* BOLES, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 504, Misc. MASUCCI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 505, Misc. KRAUS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 506, Misc. DEL PESCHIO *v.* DEL PESCHIO. C. A. 3d Cir. Certiorari denied. Reported below: 356 F. 2d 402.

No. 508, Misc. BYRD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *William H. Brown III* for petitioner. Reported below: 421 Pa. 513, 219 A. 2d 293.

No. 509, Misc. BELCHER *v.* CALIFORNIA. Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 510, Misc. WARNOCK *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 513, Misc. STILTNER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 516, Misc. MONTALVO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 517, Misc. HAMILTON *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 518, Misc. BRISTOL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 520, Misc. WRIGHT *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 521, Misc. BRAUN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 522, Misc. LATIMER *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 523, Misc. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *James W. Dorsey* for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, and *Harold N. Hill, Jr.*, and *Alfred L. Evans, Jr.*, Assistant Attorneys General, for respondent. Reported below: 222 Ga. 208, 149 S. E. 2d 449.

No. 524, Misc. SHOBE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 525, Misc. SHOCKEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 66 Ill. App. 2d 245, 213 N. E. 2d 107.

No. 527, Misc. BETILLO *v.* WARDEN, GREEN HAVEN STATE PRISON. C. A. 2d Cir. Certiorari denied.

No. 534, Misc. SCHACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 536, Misc. SHOCKEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 67 Ill. App. 2d 133, 213 N. E. 2d 573.

No. 535, Misc. EDWARDS *v.* PRASSE, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 537, Misc. ANTHONY *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 541, Misc. TURNER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 404 S. W. 2d 13.

No. 545, Misc. MITCHELL *v.* FOGLIANI, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 547, Misc. ELLISON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 548, Misc. LOPEZ *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 549, Misc. GREGG *v.* MONTANA. C. A. 9th Cir. Certiorari denied.

No. 550, Misc. LOKEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 64 Cal. 2d 626, 414 P. 2d 394.

No. 589, Misc. REIMER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 597, Misc. ADAMS *v.* HOLMAN, WARDEN. Sup. Ct. Ala. Certiorari denied.

No. 226, Misc. BOGART ET UX. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Motion to strike appendix to respondents' brief denied. Certiorari and other relief denied. *Peter D. Bogart, pro se,* and for other petitioner. *Evelle J. Younger* for respondents. Reported below: 355 F. 2d 377.

No. 126, Misc. SMITH *v.* BROWN. Sup. Ct. App. Va. Motion to substitute Helen Bunting Brown as the party respondent in place of Mary J. Bunting granted. Certiorari denied. *Joseph Teck* for petitioner.

No. 224, Misc. ENGLING *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 357 F. 2d 267.

No. 231, Misc. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 337 F. 2d 180.

No. 428, Misc. CHASE *v.* ROBBINS, WARDEN. C. A. 1st Cir. Certiorari and other relief denied.

Rehearing Denied.

No. 113, October Term, 1955. JEOFFROY MFG., INC. *v.* GRAHAM, 350 U. S. 826, 905. Motion for leave to file second petition for rehearing denied.

No. 1059, October Term, 1965. O'BRYAN *v.* CHANDLER, 384 U. S. 926. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 1228, October Term, 1965. MEDLIN *v.* UNITED STATES, 384 U. S. 973. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 88, October Term, 1965. IN RE MACKAY, 384 U. S. 1003;

No. 584, October Term, 1965. CALIFORNIA *v.* STEWART, 384 U. S. 436;

No. 762, October Term, 1965. JOHNSON ET AL. *v.* NEW JERSEY, 384 U. S. 719;

No. 776, October Term, 1965. SCHIFFER *v.* UNITED STATES, 384 U. S. 1003;

No. 959, October Term, 1965. BAINES ET AL. *v.* CITY OF DANVILLE, 384 U. S. 890;

No. 1011, October Term, 1965. WALLACE ET AL. *v.* VIRGINIA, 384 U. S. 891;

No. 1118, October Term, 1965. EXQUISITE FORM BRASSIERE, INC. *v.* FEDERAL TRADE COMMISSION, 384 U. S. 959;

No. 1169, October Term, 1965. SUBURBAN TILE CENTER, INC., ET AL. *v.* ROCKFORD BUILDING & CONSTRUCTION TRADES COUNCIL, AFL–CIO, ET AL., 384 U. S. 960;

No. 1177, October Term, 1965. DOUBLE EAGLE LUBRICANTS, INC. *v.* TEXAS, 384 U. S. 434;

No. 1179, October Term, 1965. CHARLES A. WRIGHT, INC. *v.* F. D. RICH CO., INC., 384 U. S. 960;

No. 1184, October Term, 1965. BENNETT *v.* FORD MOTOR CO., 384 U. S. 949; and

No. 1250, October Term, 1965. GROSSMAN ET VIR *v.* PEARLMAN ET AL., 384 U. S. 987. Petitions for rehearing denied.

No. 1288, October Term, 1965. ENGLAND ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL., 384 U. S. 885. Motion of Nebraska Chiropractic Physicians Association, Inc., for leave to file a brief, as *amicus curiae*, in support of appellants' petition granted. Petition for rehearing denied.

No. 1186, October Term, 1965. EASTER *v.* CLYDESDALE, INC., 384 U. S. 950. Petition for rehearing and other relief denied.

No. 965, October Term, 1965. KOHATSU *v.* UNITED STATES, 384 U. S. 1011. Motion of James O. Hewitt for leave to file a brief, as *amicus curiae*, in support of petition for rehearing granted. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 97, Misc., October Term, 1965. FANELLI *v.* NEW YORK, 384 U. S. 1014;

No. 194, Misc., October Term, 1965. SCHLETTE *v.* CALIFORNIA ET AL., 384 U. S. 1016;

No. 201, Misc., October Term, 1965. LOPEZ *v.* CALIFORNIA, 384 U. S. 1016;

No. 226, Misc., October Term, 1965. IN RE WINHOVEN, 384 U. S. 1016;

No. 263, Misc., October Term, 1965. ABDELKADER *v.* CALIFORNIA ET AL., 384 U. S. 1017;

No. 266, Misc., October Term, 1965. BICKLEY ET AL. *v.* OLIVER, WARDEN, ET AL., 384 U. S. 1017;

No. 339, Misc., October Term, 1965. CHEVALLIER *v.* TEXAS, 384 U. S. 1014;

No. 354, Misc., October Term, 1965. EDWARDS *v.* HOLMAN, WARDEN, 384 U. S. 1017;

No. 400, Misc., October Term, 1965. RICHARDSON *v.* ILLINOIS, 384 U. S. 1021;

No. 499, Misc., October Term, 1965. BEVERLY *v.* CALIFORNIA, 384 U. S. 1014;

No. 507, Misc., October Term, 1965. MCGREGOR *v.* NEW YORK, 384 U. S. 1022; and

No. 619, Misc., October Term, 1965. MORRIS *v.* WEST VIRGINIA, 384 U. S. 1022. Petitions for rehearing denied.

No. 628, Misc., October Term, 1965. SIMPSON *v.* LOUISIANA, 384 U. S. 1014;

No. 645, Misc., October Term, 1965. DEFLUMER *v.* NEW YORK, 384 U. S. 1018;

No. 678, Misc., October Term, 1965. ROSS *v.* CALIFORNIA, 384 U. S. 1026;

No. 690, Misc., October Term, 1965. WALDEN *v.* PATE, WARDEN, 384 U. S. 1018;

No. 757, Misc., October Term, 1965. RILEY *v.* CALIFORNIA ET AL., 384 U. S. 1018;

No. 785, Misc., October Term, 1965. ALLEN *v.* FLORIDA, 384 U. S. 1014;

No. 792, Misc., October Term, 1965. GOLSON ET AL. *v.* ILLINOIS, 384 U. S. 1023;

No. 850, Misc., October Term, 1965. BAZAURE *v.* CALIFORNIA, 384 U. S. 1026;

No. 936, Misc., October Term, 1965. JACOBSON *v.* CALIFORNIA, 384 U. S. 1015;

No. 961, Misc., October Term, 1965. MONTGOMERY *v.* FLORIDA, 384 U. S. 1023;

No. 1101, Misc., October Term, 1965. SMITH *v.* OHIO, 384 U. S. 1023;

No. 1122, Misc., October Term, 1965. BENNETT *v.* TEXAS, 384 U. S. 1013;

No. 1138, Misc., October Term, 1965. GILLESPIE *v.* VIRGINIA, 384 U. S. 1023;

No. 1151, Misc., October Term, 1965. BELL *v.* COLORADO, 384 U. S. 1024;

No. 1153, Misc., October Term, 1965. CHATTERTON *v.* GEORGIA, 384 U. S. 1015;

No. 1203, Misc., October Term, 1965. DRUMMOND *v.* UNITED STATES, 384 U. S. 1013; and

No. 1206, Misc., October Term, 1965. WRIGHT *v.* CALIFORNIA, 384 U. S. 1027. Petitions for rehearing denied.

No. 1325, Misc., October Term, 1965. OWINGS *v.* UNITED STATES COURT OF MILITARY APPEALS ET AL., 384 U. S. 975;

No. 1333, Misc., October Term, 1965. OPELA *v.* UNITED STATES, 384 U. S. 1025;

No. 1338, Misc., October Term, 1965. GUNSTON *v.* UNITED STATES, 384 U. S. 913;

No. 1341, Misc., October Term, 1965. MANNA *v.* UNITED STATES, 384 U. S. 975;

No. 1342, Misc., October Term, 1965. DELESPINE *v.* TEXAS, 384 U. S. 1019;

No. 1347, Misc., October Term, 1965. MOTTE ET AL. *v.* RYAN, CHIEF JUDGE, U. S. DISTRICT COURT, 384 U. S. 975;

No. 1369, Misc., October Term, 1965. GREGORY *v.* NEW YORK, 384 U. S. 1016;

No. 1373, Misc., October Term, 1965. MORGAN *v.* UNITED STATES, 384 U. S. 1025;

No. 1381, Misc., October Term, 1965. WHISMAN *v.* GEORGIA, 384 U. S. 895;

No. 1383, Misc., October Term, 1965. GREAR *v.* MAXWELL ET AL., 384 U. S. 957;

No. 1407, Misc., October Term, 1965. VUCKSON *v.* UNITED STATES, 384 U. S. 991;

No. 1422, Misc., October Term, 1965. SMITH *v.* REINCKE, WARDEN, 384 U. S. 993;

No. 1459, Misc., October Term, 1965. MATLOCK *v.* UNITED STATES, 384 U. S. 957;

No. 1530, Misc., October Term, 1965. KRZYZEWSKA *v.* ILLINOIS ET AL., 384 U. S. 979;

No. 1542, Misc., October Term, 1965. JULIANO *v.* OHIO ET AL., 384 U. S. 983;

No. 1556, Misc., October Term, 1965. FORMAN ET AL. *v.* CITY OF MONTGOMERY, 384 U. S. 1009; and

No. 1601, Misc., October Term, 1965. DEAL *v.* CALIFORNIA ET AL., 384 U. S. 1020. Petitions for rehearing denied.

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No. 338, Misc., October Term, 1965. PEEK *v.* UNITED STATES ET AL., 384 U. S. 1017;

No. 557, Misc., October Term, 1965. PISCITELLO *v.* NEW YORK, 384 U. S. 1022;

No. 577, Misc., October Term, 1965. LAINE *v.* CALIFORNIA, 384 U. S. 1020;

No. 723, Misc., October Term, 1965. MEDRANO *v.* WILSON, WARDEN, 384 U. S. 1018;

No. 912, Misc., October Term, 1965. COTTON *v.* YAWN, WARDEN, 384 U. S. 948;

No. 1188, Misc., October Term, 1965. MCCLUNG *v.* WASHINGTON, 384 U. S. 1013; and

No. 1336, Misc., October Term, 1965. CLEMONS *v.* TEXAS, 384 U. S. 1015. Motions for leave to file petitions for rehearing denied.

No. 426, Misc., October Term, 1965. WARRINER *v.* FINK ET AL., 382 U. S. 871, 922; and

No. 485, Misc., October Term, 1965. FINFER *v.* COHEN, COMMISSIONER OF INTERNAL REVENUE, 382 U. S. 883, 949. Motions for leave to file second petitions for rehearing denied.

OCTOBER 17, 1966.

Miscellaneous Orders.

No. 47. UNITED STATES *v.* FABRIZIO. Appeal from D. C. W. D. N. Y. (Probable jurisdiction noted, 383 U. S. 904.) Motion of the State of New Hampshire for leave to participate in oral argument, as *amicus curiae*, granted and thirty minutes are allotted for that purpose. The Solicitor General shall be allotted an additional thirty minutes to argue on behalf of the United States. *Joseph A. Millimet*, Special Assistant Attorney General of New Hampshire, on the motion.

No. 28, Original. DELAWARE ET AL. *v.* NEW YORK ET AL. The separate motions of the Commonwealths of Kentucky and Pennsylvania, and the States of South Dakota, North Dakota, Oklahoma, Utah, Wyoming, Florida, Iowa, Arkansas, Kansas and West Virginia, for permission to be realigned as plaintiffs, are granted. The motion for leave to file a bill of complaint is denied. The following officials for their respective States on the motions: *Robert Matthews,* Attorney General of Kentucky, and *Holland N. McTyeire,* Assistant Attorney General; *Edward Friedman,* Attorney General of Pennsylvania; *Frank L. Farrar,* Attorney General of South Dakota, and *Walter W. Andre,* Assistant Attorney General; *Helgi Johanneson,* Attorney General of North Dakota, and *Paul M. Sand,* First Assistant Attorney General; *Charles Nesbitt,* Attorney General of Oklahoma; *Phil L. Hansen,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General; *John F. Raper,* Attorney General of Wyoming; *Earl Faircloth,* Attorney General of Florida; *Laurence F. Scalise,* Attorney General of Iowa; *Bruce Bennett,* Attorney General of Arkansas; *Robert C. Londerholm,* Attorney General of Kansas, and *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General. *David P. Buckson,* Attorney General of Delaware, *Robert G. Dixon, Jr.,* and *James C. Kirby, Jr.,* for plaintiff State of Delaware. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler* and *Brenda Soloff,* Assistant Attorneys General, for defendant State of New York.

No. 114. VACA ET AL. *v.* SIPES, ADMINISTRATOR. Sup. Ct. Mo. (Certiorari granted, 384 U. S. 969.) Motion of petitioners to remove this case from the summary calendar denied. *David E. Feller* on the motion.

No. 68. SPENCER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. (Probable jurisdiction noted, 382 U. S. 1022.) Motion of petitioner for appointment of counsel granted, and it is ordered that *Michael D. Matheny, Esquire,* of Beaumont, Texas, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 621, Misc. WALKER *v.* WILSON, WARDEN, ET AL.;
No. 653, Misc. LAND *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;
No. 657, Misc. FREEMAN *v.* MAXWELL, WARDEN, ET AL.;
No. 683, Misc. DARBY *v.* FLORIDA; and
No. 740, Misc. EVANS *v.* CICCONE, DIRECTOR, MEDICAL CENTER FOR FEDERAL PRISONERS, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 570, Misc. KEEZER *v.* TAHASH, WARDEN;
No. 596, Misc. BANDY *v.* UNITED STATES ATTORNEY GENERAL;
No. 625, Misc. MURRAY *v.* WILSON, WARDEN, ET AL.;
No. 743, Misc. BEVERLY *v.* CALIFORNIA; and
No. 744, Misc. HENRY *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 429, Misc. GRAY *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; and
No. 604, Misc. SCHACK *v.* MEADOWS, UNITED STATES ATTORNEY. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 305. DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. Probable jurisdiction noted. *William H. Dempsey, Jr., Giles Morrow, Harry C. Ames, Peter T. Beardsley, Harry Jordan, R. Edwin Brady, Jeremiah C. Waterman, C. W. Fiddes, David Axelrod, Eugene T. Lüpfert* and *Warren A. Goff* for appellants. *Solicitor General Marshall, Assistant Attorney General Turner, Robert S. Rifkind, Howard E. Shapiro, Charles L. Marinaccio, Robert W. Ginnane* and *Betty Jo Christian* for the United States et al., and *Thomas D. Barr* and *Owen Jameson* for Railway Express Agency, Inc., et al., appellees. Reported below: 255 F. Supp. 704.

Certiorari Granted. (See also No. 374, *ante*, p. 18.)

No. 342. FEDERAL TRADE COMMISSION *v.* PROCTER & GAMBLE CO. C. A. 6th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner* and *James McI. Henderson* for petitioner. *Kenneth C. Royall, Frederick W. R. Pride* and *Robert D. Larsen* for respondent. Reported below: 358 F. 2d 74.

No. 343. PRIMA PAINT CORP. *v.* FLOOD & CONKLIN MFG. CO. C. A. 2d Cir. Certiorari granted. *Robert P. Herzog* for petitioner. *Joseph B. Russell, David N. Brainin* and *Martin A. Coleman* for respondent. Reported below: 360 F. 2d 315.

Certiorari Denied. (See also No. 125, *ante*, p. 17; and Misc. Nos. 570, 596, 625, 743 and 744, *supra*.)

No. 299. DOWNIE *v.* UNITED STATES LINES CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Thomas F. Mount* for respondent. Reported below: 359 F. 2d 344.

No. 123. LUCOM ET VIR *v.* ATLANTIC NATIONAL BANK OF WEST PALM BEACH. C. A. 5th Cir. Certiorari denied. *Charles M. Trammell* and *Eugene Gressman* for petitioners. *Herbert S. Sawyer* and *Irwin L. Langbein* for respondent. Reported below: 354 F. 2d 51.

No. 326. WILLMORE *v.* WILLMORE. Sup. Ct. Minn. Certiorari denied. *Samuel J. L'Hommedieu, Jr.*, for petitioner. *Raymond C. Ploetz* for respondent. Reported below: 273 Minn. 537, 143 N. W. 2d 630.

No. 341. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *Irving Abramson* and *Ruth Weyand* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *David L. Benetar* for General Electric Co., respondents. Reported below: 358 F. 2d 292.

No. 354. GAY, TRUSTEE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Albert H. Greene* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for the United States. Reported below: 174 Ct. Cl. 420, 356 F. 2d 516.

No. 356. SARDINO *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Victor Rabinowitz* and *Leonard Boudin* for petitioner. *Solicitor General Marshall, Morton Hollander* and *Kathryn H. Baldwin* for respondents. Reported below: 361 F. 2d 106.

No. 367. COOPER ET AL. *v.* CITY OF OKLAHOMA CITY. Sup. Ct. Okla. Certiorari denied. *Leslie L. Conner, Charles Hills Johns, O. A. Cargill, Jr.*, and *James M. Little* for petitioners. *James G. Hamill* for respondent.

No. 363. In re Reese. C. C. P. A. Certiorari denied. *Charles O. Bruce* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Edward Berlin* for the Commissioner of Patents. Reported below: 53 C. C. P. A. (Pat.) 1099, 359 F. 2d 462.

No. 405. Levy et al. *v.* Limandri et al. Sup. Ct. N. J. Certiorari denied. *Michael Breitkopf* for petitioners. *David Cohn* for respondents.

No. 372. Allan Drug Corp. *v.* United States. C. A. 10th Cir. Certiorari denied. *Donald E. Kelley* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, William Goodrich* and *Arthur A. Dickerman* for the United States. Reported below: 357 F. 2d 713.

No. 386. Rougeron *v.* Rougeron. Ct. App. N. Y. Certiorari denied. *Philip W. Amram* for petitioner. *Francis S. Bensel* and *Bud G. Holman* for respondent. Reported below: 17 N. Y. 2d 264, 217 N. E. 2d 639.

No. 393. General Tire & Rubber Co. *v.* Watkins, U. S. District Judge, et al. C. A. 4th Cir. Certiorari denied. *Charles J. Merriam* and *Norman P. Ramsey* for petitioner. *Benjamin C. Howard* for respondent Firestone Tire & Rubber Co. Reported below: 363 F. 2d 87.

No. 396. Ach et al. *v.* Commissioner of Internal Revenue; and

No. 449. Commissioner of Internal Revenue *v.* Ach Corp. C. A. 6th Cir. Certiorari denied. *H. J. Siebenthaler* for petitioners in No. 396. *Solicitor General Marshall, Acting Assistant Attorney General Pugh* and *Harold C. Wilkenfeld* for respondent in No. 396 and petitioner in No. 449. Reported below: 358 F. 2d 342.

No. 394. D'ANTONIO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis, Anna R. Lavin* and *Edward J. Calihan, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 362 F. 2d 151.

No. 397. SEA-LAND SERVICE, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Herbert Burstein* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 356 F. 2d 955.

No. 398. NAVIOS CORP. ET AL. *v.* NATIONAL MARITIME UNION OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. *Earle K. Shawe, Wendell W. Lang, W. Charles Hogg, Jr.*, and *Samuel B. Fortenbaugh, Jr.*, for petitioners. Reported below: 359 F. 2d 853.

No. 410. ANTILLES SURVEYS, INC. *v.* DE JONGH, COMMISSIONER, DEPARTMENT OF FINANCE, ET AL. C. A. 3d Cir. Certiorari denied. *Warren H. Young* and *John D. Marsh* for petitioner. *Francisco Corneiro,* Attorney General of the Virgin Islands, and *David Kelso McConnell,* Assistant Attorney General, for respondents. Reported below: 358 F. 2d 787.

No. 411. DERRITT *v.* STATE BOARD OF REAL ESTATE EXAMINERS. Sup. Ct. Ohio. Certiorari denied. *John G. Pegg* and *John H. Bustamante* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *Gerald A. Donahue,* First Assistant Attorney General, for respondent.

No. 412. MCFADDIN EXPRESS, INC., ET AL. *v.* ADLEY CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Tobias Weiss* for petitioners. *Joseph P. Cooney* for respondents. Reported below: 363 F. 2d 546.

No. 124. SANDOVAL ET UX. *v.* RATTIKIN, TRUSTEE. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. *Roger Butler, Luther E. Jones, Jr.,* and *John D. Cofer* for petitioners. Reported below: 395 S. W. 2d 889.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS joins, dissenting from the denial of certiorari.

In my judgment, this petition presents important issues as to the scope of the requirement, derived from the Due Process Clause of the Fourteenth Amendment, that state courts in civil actions must afford to each litigant a "proper opportunity to present his evidence." *Saunders* v. *Shaw,* 244 U. S. 317, 319 (1917). Cf. *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639 (1929); *Armstrong* v. *Manzo,* 380 U. S. 545 (1965); *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S. 306 (1950).

Petitioners are illiterate indigents. They speak only Spanish. They and their five children have lived for many years on the meager homestead involved in this case. Petitioners executed a deed to the homestead. Respondent is assignee of this deed. Respondent brought this action and obtained a judgment confirming his title and possessory rights to the property under the deed. Petitioners seek review of the judgment of the Texas Court of Civil Appeals which affirmed this judgment.

At the trial, petitioners were represented by a Legal Aid attorney. The trial was perfunctory. After judgment was entered for respondent, petitioners obtained new counsel who filed a timely motion for new trial. This motion alleged that petitioners had a good and sufficient defense to the action: namely, that the "deed" was in truth a mortgage given to secure a debt and that respondent took with notice of this fact. The motion alleged that this defense was not adduced at trial because of the default of petitioners' Legal Aid counsel.

The trial court held an elaborate hearing on the motion for new trial. The Legal Aid lawyer who had represented petitioners at the trial testified candidly that he had not had adequate time to prepare the case, and that he was further handicapped by his inability to speak or understand Spanish.

Petitioners' counsel in this Court urge that, in the circumstances of this case, the refusal of the trial court to grant the timely motion for a new trial deprived petitioners of their rights under the Fourteenth Amendment. I believe that we should grant the writ and rule upon the question so presented.

To some extent, a lawyer's client like a doctor's patient must suffer the consequences of his champion's mistakes. But there are limits; and the courts are and should be quick to relieve the client of his lawyer's default whenever that is feasible and does not result in unfairness to others. See MR. JUSTICE BLACK's dissent from the denial of certiorari in *Santana* v. *United States, ante,* p. 848. Obviously, this principle applies to the defaults of lawyers made available to aid indigents. The measure of constitutional protection afforded citizens who are recipients of free legal services, whether provided by the State or by private charity, is not less than that available to those who pay their own way.

While the present case received the careful attention of both the trial court and the Court of Civil Appeals of Texas, for reasons stated at length in the dissenting opinion of Judge Sharpe in the Texas Court of Civil Appeals, I am of the opinion that this case deserves and requires the consideration of this Court. I would grant the petition.

No. 85, Misc. LITTLE, AKA HARDEN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 241 Ore. 557, 407 P. 2d 627.

No. 418. MARINE NATIONAL EXCHANGE BANK, EXECUTOR *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Motion of John D. Merwin for leave to file brief, as *amicus curiae*, granted. Certiorari denied. *Warren H. Young* and *Theodore A. Groenke* for petitioner. *Almeric L. Christian* for respondent. *John D. Merwin, pro se*, as *amicus curiae*, in support of the petition. Reported below: 359 F. 2d 569.

No. 266, Misc. CARROLL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 397 S. W. 2d 82.

No. 295, Misc. WEIGAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 331, Misc. MCCURDY *v.* BROWN, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for respondent. Reported below: 359 F. 2d 491.

No. 409, Misc. SHIPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 359 F. 2d 185.

No. 432, Misc. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 413, Misc. MASSEY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 68 Wash. 2d 88, 411 P. 2d 422.

No. 424, Misc. HUNT *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 445, Misc. DANIELS *v.* COOK BROADCASTING CO. ET AL. C. A. 10th Cir. Certiorari denied. *R. Bowland Ritchie* for petitioner. *Dale M. Stucky* for respondent Cook Broadcasting Co. Reported below: 357 F. 2d 649.

No. 472, Misc. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 486, Misc. FAULS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 501, Misc. PIRACCI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 555, Misc. LANA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 564, Misc. OLIVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 363 F. 2d 15.

No. 577, Misc. BINGHAM *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 557, Misc. WOODS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Reported below: 68 Wash. 2d 601, 414 P. 2d 601.

No. 571, Misc. COLEMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 362 F. 2d 905.

No. 578, Misc. JAMES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 591, Misc. OLDEN *v.* ELGIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 592, Misc. MILBRADT *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 593, Misc. DAVIS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 595, Misc. MADDAUS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 17 N. Y. 2d 625, 216 N. E. 2d 332.

No. 598, Misc. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 599, Misc. BEY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 121 U. S. App. D. C. 337, 350 F. 2d 467.

No. 601, Misc. POULSON *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 359 F. 2d 588.

No. 605, Misc. MACK *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 610, Misc. JOHNSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 616, Misc. TROUT *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied.

No. 617, Misc. JOHNSON *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 618, Misc. MILLER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 634, Misc. SWINDLE *v.* CHANCERY COURT OF GREENE COUNTY ET AL. Sup. Ct. Ark. Certiorari denied. *Maurice Cathey* for petitioner. Reported below: 240 Ark. 839, 403 S. W. 2d 63.

No. 636, Misc. TOMAIOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 638, Misc. GAXIOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 659, Misc. SCHILDHAUS *v.* CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *J. Lee Rankin* for respondent.

No. 667, Misc. CHASE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Walter J. Hurley* for petitioner. *John P. S. Burke* for respondent. Reported below: 350 Mass. 738, 217 N. E. 2d 195.

No. 75, Misc. WINTERS *v.* BECK, PENAL FARM SUPERINTENDENT. Sup. Ct. Ark. Certiorari denied. *Jack Greenberg, James M. Nabrit III* and *Michael Meltsner* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *William Powell Thompson* and *Fletcher Jackson,* Assistant Attorneys General, for respondent. Reported below: 239 Ark. 1093, 397 S. W. 2d 364.

MR. JUSTICE STEWART, dissenting from the denial of certiorari.

The petitioner, an indigent Negro, was arrested on a charge of "immorality," a misdemeanor under an ordinance of Little Rock, Arkansas. Later the same day he was brought before the municipal court, where, after pleading not guilty, he was tried, convicted, and sentenced to 30 days in jail and a $254 fine, including costs. He was unable to pay the fine, so his punishment was converted under the Arkansas "dollar-a-day" statute (Ark. Stat. Ann. § 19–2416 (1956 Repl. Vol.)) to imprisonment for 9½ months.

At his trial the petitioner was not represented by counsel. He did not ask for the assistance of counsel and was not informed by the trial judge, or by anybody else, of any right to counsel, appointed or retained. The judge did not advise him of the nature of the charges against him, of the possible penalty, or of his right to make objections, cross-examine witnesses, present witnesses in his own behalf, or to have a trial *de novo* in the county circuit court under Ark. Stat. Ann. §§ 44–115, 44–509 (1964 Repl. Vol.). Not surprisingly, the petitioner did not object to the evidence offered by the prosecution, did not cross-examine the prosecution witnesses, did not present witnesses in his own behalf, and did not exercise his right to a trial *de novo* in the county circuit court. Also not surprisingly, the petitioner did not question the vagueness of the charge against him

or the validity of converting a sentence of 30 days into one of 9½ months solely because of his poverty.

From the prison farm where he was incarcerated, the petitioner applied to the Supreme Court of Arkansas for a writ of habeas corpus, upon the ground that he had been unconstitutionally tried and convicted "without the benefit of counsel and without being advised of his rights to counsel." The Arkansas Supreme Court denied relief, holding that the constitutional rule of *Gideon* v. *Wainwright*, 372 U. S. 335, does not apply "in misdemeanor cases."

This decision of the Supreme Court of Arkansas is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit, which has held that indigent defendants have a constitutional right to counsel in misdemeanor cases. *McDonald* v. *Moore*, 353 F. 2d 106; *Harvey* v. *Mississippi*, 340 F. 2d 263. This conflict must be resolved, unless the Constitution of the United States is going to mean one thing in Arkansas and something else in Mississippi.

In *Gideon* v. *Wainwright*, *supra*, we said that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." At 344. No State should be permitted to repudiate those words by arbitrarily attaching the label "misdemeanor" to a criminal offense.* I think this Court has a duty to resolve the conflict and clarify the scope of *Gideon* v. *Wainwright*. I do not suggest what the ultimate resolution of this problem should be, but I do suggest that the answer cannot be made to depend upon artificial or arbitrary labels of "felony" or "misdemeanor" attached to

*In Arkansas, some misdemeanors are punishable by up to three years' imprisonment. (Ark. Stat. Ann. § 41–805 (1964 Repl. Vol.).)

criminal offenses by 50 different States. Whatever one's view may be as to the appropriate exercise of this Court's certiorari jurisdiction, surely it is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded with an even hand in all the States.

For these reasons I would grant certiorari, hear argument, and decide the important issue which this case clearly presents.

MR. JUSTICE BLACK would also grant the petition for certiorari.

No. 91, Misc. BUDD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *George F. Duke, Marshall W. Krause* and *James B. Schnake* for petitioner. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *William D. Stein*, Deputy Attorney General, for respondent. Briefs of *amici curiae*, in support of the petition, were filed for the Public Defender of Sacramento County, and by *Eugene I. Lambert* for the Washington, D. C., Area Council on Alcoholism et al.

MR. JUSTICE FORTAS, dissenting from the denial of certiorari.

This case presents the important question whether punishment may constitutionally be inflicted, pursuant to § 647 (f) of the California Penal Code, upon a person suffering from the disease of alcoholism—as distinguished from drunkenness or periodic, voluntary overindulgence in intoxicants. The California statute provides, in part, that any person "found in any public place under the influence of intoxicating liquor . . . in such a condition that he is unable to exercise care for his own safety or the safety of others" is guilty of a misdemeanor. Petitioner

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challenges the statute on the ground, among others, that its application to him, allegedly an alcoholic, constitutes "cruel and unusual punishment" in contravention of the Eighth Amendment of the Federal Constitution.

I believe that we should grant the writ. The trial court made no finding as to whether petitioner suffered from alcoholism, presumably because of its legal conclusion that alcoholism affords no defense to the statutory charge. The trial record squarely presents the issue whether alcoholism is, as a matter of law, a defense to the charge. There is abundant evidence in this record to impel a finding that petitioner is an alcoholic, that he suffers from an illness which results in inability to control either his drinking or certain aspects of behavior after he has been drinking. And the constitutional questions sought to be raised here were presented to each of the state courts through which this case has passed.[1]

It is time for this Court to decide whether persons suffering from the illness of alcoholism and exhibiting

[1] Petitioner is seeking review of the denial by the California Supreme Court of a writ of habeas corpus. Respondent challenges our jurisdiction on the ground that petitioner failed to seek review here of the summary affirmance by the Appellate Department of the California Superior Court, or of that court's refusal to certify the case to the District Court of Appeal. Although determination of the jurisdictional issue can be postponed until the case is heard on the merits, no reason appears why we cannot properly review the denial of habeas corpus. It appears that the California Supreme Court, in which petitioner sought a writ of habeas corpus in lieu of proceeding here by way of certiorari, had jurisdiction over the questions raised. *In re Klor*, 64 Cal. 2d 816, 415 P. 2d 791 (1966); *In re Zerbe*, 60 Cal. 2d 666, 388 P. 2d 182 (1964); see *In re Jackson*, 61 Cal. 2d 500, 393 P. 2d 420 (1964). Accordingly, we have jurisdiction to entertain this as a timely petition for review of the final decision of the highest court of the State.

its symptoms or effects may be punished criminally therefor. The Court has already held that a State may not punish for narcotics addiction, that to do so would violate the constitutional prohibition of cruel and unusual punishment. *Robinson* v. *California*, 370 U. S. 660 (1962). MR. JUSTICE STEWART'S opinion for the Court in *Robinson* makes it clear that a State may not constitutionally inflict punishment for an illness, whether the illness be narcotics addiction or the "common cold." *Id.*, at 667.[2] We should hear argument in the present case to consider whether it presents a situation which commands similar constitutional proscription.

The question has great practical and social significance. We are told that some 6,000,000 Americans are afflicted with alcoholism and that each year more than 1,500,000 arrests—three of every eight—are for drunkenness. Although we do not know how many of those arrested for drunkenness are properly classifiable as alcoholics—that is, whose conduct may be traced to illness rather than

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[2] This principle, that the sick should be treated in hospitals rather than in prisons, is beginning to affect our society's view as to the disposition even of those who are "ill" but, unlike *Robinson*, are convicted for crimes other than the illness itself. See S. 2191 and H. R. 9167, bills pending in the Eighty-ninth Congress to provide civil commitment rather than imprisonment for certain narcotics addicts convicted of federal criminal offenses. See 112 Cong. Rec. 24401–24421 (Oct. 6, 1966), and especially, the statement of Senator McClellan whose committee reported the Senate bill out. According to Senator Ervin, who joined in urging passage, the rationale for the proposed legislation is the "proposition . . . that drug addiction is primarily a medical problem, not a criminal problem. . . . We must heed the advice our medical authorities have offered for many years and establish procedures for the medical treatment of individual addicts designed to cure and rehabilitate them so that they can be returned to society as useful, productive citizens." *Id.*, at 24419.

to choice—there is ample evidence that the number is very large.[3]

Petitioner's case presents the familiar and dismal round of repeated sojourns in the "drunk-tank"; the spectacle of repeated cycles of arrests for "drunkenness," incarceration, release, and arrest for "drunkenness" all over again. At age 56, petitioner has a record of more than 40 arrests for drunkenness or conduct while drunk. There was testimony that petitioner has been an alcoholic for over 30 years, that his act of buying liquor, as well as drinking to intoxication, is involuntary. In the past 10 years, he has been through the arrest-release cycle more than 20 times.

This record and the medical literature admonish us that punishment of alcoholics does society no good. It can be applauded only by the uninformed or the sadistic. It is neither a deterrent nor a cure for those afflicted. On the contrary, as testified here, it is not only ineffective, but "particularly antitherapeutic because it increases the feelings of worthlessness that all alcoholics have . . . ." This does not, of course, mean that alcoholics need be, or should be, permitted to endanger themselves and others, or to be public nuisances. Each of the 50 States has some sort of noncriminal procedure for dealing with alcoholics, and in each State some procedure exists or can be provided for intelligent, purposeful handling of the various aspects of the problem.

Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from "insanity," ad-

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[3] See 162 Journal of the American Medical Assn. 750 (October 1956); "Alcoholism," Public Health Serv. Pub. No. 730 (1960); Message of the President to Congress, March 1, 1966, proposing a program to attack the disease of alcoholism, 112 Cong. Rec. 4145, 4147.

diction to narcotics, or from other illnesses. The use of the crude and formidable weapon of criminal punishment of the alcoholic is neither seemly nor sensible, neither purposeful nor civilized. This Court should determine whether it is constitutionally permissible, or whether, as the Court of Appeals for the Fourth Circuit [4] and four of the eight judges of the Court of Appeals for the District of Columbia Circuit [5] have held, it is cruel and unusual punishment—punishment in the absence of volitional fault, punishment which our Constitution forbids.

MR. JUSTICE DOUGLAS joins this opinion, believing that being an alcohol addict, like being a drug addict, is beyond the reach of the criminal law for the reasons stated in his concurring opinion in *Robinson* v. *California*, 370 U. S. 660, 668.

No. 558, Misc. MACKENZIE *v.* ROBBINS, WARDEN. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John H. Quinn, Jr.*, for petitioner. *Richard J. Dubord*, Attorney General of Maine, and *John W. Benoit*, Assistant Attorney General, for respondent. Reported below: 364 F. 2d 45.

Rehearing Denied.

No. 660, October Term, 1965. JONES, ADMINISTRATOR *v.* UNITED STATES, 382 U. S. 975, 383 U. S. 922. Motion for leave to file second petition for rehearing denied.

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[4] *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).

[5] *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966), in which the entire court agreed that Congress intended that District alcoholics not be punished for the offense of public drunkenness, four of the judges preferring to rest their decision on constitutional grounds.

OCTOBER 18, 1966.

Miscellaneous Order.

No. —. ERIE-LACKAWANNA RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

Applications for a stay of enforcement of an order of the Interstate Commerce Commission [1] authorizing a merger of the Pennsylvania R. Co. and the New York Central R. Co., pending this Court's determination of appeals from a decision of a three-judge district court in the Southern District of New York, 259 F. Supp. 964, sustaining the Commission's order, have been submitted to MR. JUSTICE HARLAN, as the Associate Justice assigned to the Second Circuit, by eight railroad companies,[2] a number of New Jersey and Pennsylvania communities,[3] and a Pennsylvania R. Co. stockholder.[4]

MR. JUSTICE HARLAN, pursuant to our Rule 50 (6) has referred the applications to the Court for disposition. Papers in opposition have been submitted by the Interstate Commerce Commission and various other parties.[5] In addition, the Baltimore & Ohio R. Co. for itself and certain other railroad carriers [6] has filed an appeal, a juris-

[1] Order of April 6, 1966, 327 I. C. C. 475, as modified by Order of September 16, 1966, — I. C. C. —.

[2] Erie-Lackawanna R. Co.; Delaware & Hudson R. Corp.; Baltimore & Ohio R. Co.; Central R. Co. of New Jersey; Chesapeake & Ohio R. Co.; Norfolk & Western R. Co.; Reading Co.; Western Maryland R. Co.

[3] City of Hoboken, City of Union City, Township of North Bergen, and Township of Weehawken (communities in the State of New Jersey); Borough of Freedom and City of Scranton (communities in the Commonwealth of Pennsylvania).

[4] Milton J. Shapp, who appears also as a citizen of Pennsylvania.

[5] Pennsylvania R. Co.; New York Central R. Co.; Trustees of the New York, New Haven & Hartford R. Co.; States of Connecticut, Massachusetts, Rhode Island, and New York; City of Philadelphia; Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Greater Pittsburgh.

[6] Central R. Co. of New Jersey; Chesapeake & Ohio R. Co.; Norfolk & Western R. Co; Reading Co.; Western Maryland R. Co.

dictional statement, and a motion to accelerate consideration thereof. Similar papers have been filed by Delaware & Hudson R. Corp. and Erie-Lackawanna R. Co.

Upon consideration of such applications and motions and of all papers filed in opposition, a stay of enforcement of the order of the Interstate Commerce Commission and the motions to accelerate are hereby granted subject to and in accordance with the following expedited schedule. See *Hannah* v. *Larche*, 361 U. S. 910. Appellants (who desire to appeal and have not already done so) shall file notices of appeal, shall docket the case, and shall file jurisdictional statements and briefs on the merits on or before November 30, 1966. Appellees shall file any motions responsive to the statements as to jurisdiction and briefs on the merits of the case on or before December 30, 1966. Appellants shall file their reply briefs on or before January 6, 1967. The appeals will be consolidated, and all matters involved are set for oral argument on January 9, 1967, with a total of four hours allotted for argument. Four attorneys will be permitted to participate in the oral argument on each side, the division of time to be settled among counsel. The cases will be heard with typewritten record, but any of the parties may print as appendices to their briefs such portions of the record as they may desire.

Nothing in this order shall preclude the Interstate Commerce Commission from proceeding with its further hearings in this matter, now scheduled for October 31, 1966.

The request of the State of Connecticut for imposition of bond is denied.

Edward W. Bourne for Erie-Lackawanna Railroad Co., *Harry G. Silleck, Jr.*, for Delaware & Hudson Railroad Corp.; *George L. Saunders, Jr., Howard J. Trienens* and *Edward K. Wheeler* for Baltimore & Ohio Railroad Co. et al.; *Gordon P. MacDougall* for certain New Jersey

and Pennsylvania communities; and *Gordon P. MacDougall, Israel Packel* and *Arthur A. Arsham* for Shapp, applicants.

Briefs in opposition filed by: *Robert W. Ginnane* and *Fritz R. Kahn* for the Interstate Commerce Commission; *Hugh B. Cox, Henry P. Sailer* and *Windsor F. Cousins* for the Pennsylvania Railroad Co.; *James B. Gray* for New York Central Railroad Co.; *Joseph Auerbach* for Trustees of New York, New Haven & Hartford Railroad Co.; *Harold M. Mulvey,* Attorney General, and *Samuel Kanell* and *William J. Lynch,* Special Assistant Attorneys General, for the State of Connecticut; *Edward W. Brooke,* Attorney General, and *David Berman,* Assistant Attorney General, for the Commonwealth of Massachusetts; *J. Joseph Nugent,* Attorney General, and *Robert M. Schacht,* Special Assistant Attorney General, for the State of Rhode Island; *Louis J. Lefkowitz,* Attorney General, *Dunton F. Tynan,* Assistant Solicitor General, *Mortimer Sattler,* Assistant Attorney General, and *Walter J. Myskowski* for the State of New York; the City of Philadelphia; and by *Donald L. Wallace* for Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Greater Pittsburgh.

OCTOBER 24, 1966.

Miscellaneous Orders.

No. 100. KLOPFER *v.* NORTH CAROLINA. Sup. Ct. N. C. (Certiorari granted, 384 U. S. 959.) Motion of American Civil Liberties Union et al. for leave to file brief, as *amici curiae,* granted. *Melvin L. Wulf* on the motion.

No. 614, Misc. RUIZ *v.* DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *LeRoy E. Batchelor* for petitioner.

No. 745, Misc. ROGERS *v.* LANE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *William C. Erbecker* for petitioner.

No. 242, Misc. MILLER *v.* NEBRASKA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *Melvin K. Kammerlohr*, Assistant Attorney General, for respondent.

No. 223, Misc. AGUILAR *v.* OLIVER; and

No. 609, Misc. MILLER *v.* OLIVER ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari denied.

Certiorari Granted.

No. 164. HONDA ET AL. *v.* KATZENBACH, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari granted. *Joseph L. Rauh, Jr.*, and *John Silard* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Richard S. Salzman* for respondent. *Thomas C. Lynch*, Attorney General of California, *Charles A. O'Brien*, Chief Deputy Attorney General, and *Charles W. Rumph*, Deputy Attorney General, for the State of California, as *amicus curiae*, in support of the petition. Reported below: 123 U. S. App. D. C. 12, 356 F. 2d 351.

No. 399. TURNER ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari granted. *Nanette Dembitz* for petitioners. *Frank S. Hogan* for respondent.

No. 456. AFROYIM *v.* RUSK, SECRETARY OF STATE. C. A. 2d Cir. Certiorari granted. *Nanette Dembitz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 361 F. 2d 102.

No. 428. SECURITIES AND EXCHANGE COMMISSION *v.* UNITED BENEFIT LIFE INSURANCE CO. C. A. D. C. Cir. Certiorari granted. *Solicitor General Marshall, Nathan Lewin, Philip A. Loomis, Jr., Walter P. North* and *Jacob H. Stillman* for petitioner. *Daniel J. McCauley, Jr.*, and *Morris L. Weisberg* for respondent. Reported below: 123 U. S. App. D. C. 305, 359 F. 2d 619.

Certiorari Denied. (See also No. 426, *ante*, p. 21; No. 437, *ante*, p. 22; No. 88, Misc., *ante*, p. 21; No. 223, Misc., *ante*, p. 917; and No. 609, Misc., *ante*, p. 917.

No. 248. MONTRIE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John J. Callahan* for petitioner. *Harry Friberg* for respondent.

No. 382. HAMMOND ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Thomas J. Mazza* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 360 F. 2d 688.

No. 421. NASH MIAMI MOTORS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Neal Rutledge* and *Allan Milledge* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Burton Berkley* for respondent. Reported below: 358 F. 2d 636.

No. 423. MARYLAND CASUALTY CO. *v.* SEMINOLE TRIBE OF FLORIDA, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Dwight L. Rogers, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Robert M. Perry* for the United States, as *amicus curiae*, in opposition. Reported below: 361 F. 2d 517.

No. 433. McGraw-Edison Co. *v.* Preformed Line Products Co. C. A. 9th Cir. Certiorari denied. *Herbert A. Huebner, Richard M. Worrel* and *Harlan P. Huebner* for petitioner. *Richard F. Stevens* and *Patrick H. Hume* for respondent. Reported below: 362 F. 2d 339.

No. 435. West et al. *v.* Gilbert et al. C. A. 2d Cir. Certiorari denied. *Richard H. Wels* for petitioners. *Donald J. Cohn* for respondents E. L. Bruce Co., Inc., et al., *Julian Jawitz* for respondent D'Susa and *Israel G. Seeger* for respondents Fio Rito et al. Reported below: 361 F. 2d 314.

No. 436. Norfolk Dredging Co. *v.* United States. Ct. Cl. Certiorari denied. *Francis N. Crenshaw* and *Guilford D. Ware* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 175 Ct. Cl. 594, 360 F. 2d 619.

No. 439. Herlong-Sierra Homes, Inc. *v.* United States. C. A. 9th Cir. Certiorari denied. *Benjamin H. Dorsey* and *Alvin Landis* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 300.

No. 442. Volkswagen Interamericana, S. A. *v.* Rohlsen. C. A. 1st Cir. Certiorari denied. *Raymond L. Falls, Jr.*, for petitioner. *John D. Marsh* for respondent. Reported below: 360 F. 2d 437.

No. 443. Schabert *v.* United States. C. A. 2d Cir. Certiorari denied. *Arthur Karger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 362 F. 2d 369.

No. 444. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 59.

No. 445. MARTIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *John O'C. FitzGerald* for petitioners. *Solicitor General Marshall* for respondent. Reported below: 358 F. 2d 63.

No. 446. CENTRAL OF GEORGIA RAILWAY CO. ET AL. *v.* ALTMAN ET AL. C. A. D. C. Cir. Certiorari denied. *Gerhard A. Gesell* for petitioners. *Victor A. Altman, pro se,* and for other respondent. Reported below: 124 U. S. App. D. C. 155, 363 F. 2d 284.

No. 448. CITY OF MIAMI BEACH *v.* KIRSNER ET UX. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Burnett Roth* for petitioner. *John M. Thomson* for respondents. Reported below: 178 So. 2d 65.

No. 453. RUTH *v.* BLUE RIVER CONSTRUCTORS ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Charles R. Ault* for respondents.

No. 459. AMERICAN INFRA-RED RADIANT CO., INC., ET AL. *v.* LAMBERT INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. *J. Matthews Neale* for petitioners. *Ralph F. Merchant* for respondents. Reported below: 360 F. 2d 977.

No. 460. MONTANARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 362 F. 2d 527.

No. 454. WILKES *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied.

No. 461. LIFETIME SIDING, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Thomas C. Hartzell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for the United States. Reported below: 359 F. 2d 657.

No. 401. CHEMICAL BANK NEW YORK TRUST CO., TRUSTEE *v.* THE WESTHAMPTON, FORMERLY THE MONTAUK POINT. C. A. 4th Cir. Motion of the Government of the Bundesrepublik Deutschland for leave to file brief, as *amicus curiae*, granted. Certiorari denied. *William A. Grimes* for petitioner. *David R. Owen, Sol C. Berenholtz* and *Solomon Kaplan* for Fertex Steamship Corp. et al., and *Bethuel M. Webster* for Kheel et al., intervenors below. *H. Struve Hensel* for the Government of the Bundesrepublik Deutschland, as *amicus curiae*. Reported below: 358 F. 2d 574.

No. 429. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *John W. Cragun* and *Richard A. Baenen* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 175 Ct. Cl. 451.

No. 441. SCHWARTZ *v.* EATON ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Sidney L. Garwin* for petitioner. *Carl E. Newton* and *M. Lauck Walton* for respondents Eaton et al. and *Thomas F. Daly* for respondent Young. Reported below: 360 F. 2d 211.

No. 458. HYNNING, TRUSTEE *v.* PARTRIDGE, TRUSTEE, ET AL. C. A. D. C. Cir. Motion to use record in No. 766, October Term, 1964, granted. Certiorari denied. *Clifford J. Hynning, pro se,* and *John O. Hally* and *Lawrence C. Moore* for petitioner. *Philip F. Herrick* for respondents. Reported below: 123 U. S. App. D. C. 287, 359 F. 2d 271.

No. 160, Misc. LANCEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and Julia Cooper* for the United States. Reported below: 356 F. 2d 407.

No. 176, Misc. CAMPBELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 355 F. 2d 394.

No. 307, Misc. LEDBETTER *v.* UTAH. Sup. Ct. Utah. Certiorari denied. *George H. Searle* for petitioner. *Phil L. Hansen,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for respondent. Reported below: 17 Utah 2d 353, 412 P. 2d 312.

No. 349, Misc. GRAHAM *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Patrick M. Wall* and *Leon B. Polsky* for petitioner. *Aaron E. Koota* for respondent.

No. 466, Misc. NEWHOUSE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Sacramento. Certiorari denied. *S. Carter McMorris* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Nelson P. Kempsky,* Deputy Attorneys General, for respondent.

No. 470, Misc. KING *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 240 Cal. App. 2d 389, 49 Cal. Rptr. 562.

No. 532, Misc. RUSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Laurence Rosenthal* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 362 F. 2d 843.

No. 607, Misc. MITCHELL *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 619, Misc. ALCORCHA *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 622, Misc. VIRGIL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Samuel S. Mitchell* and *Romallus O. Murphy* for petitioner. *T. W. Bruton*, Attorney General of North Carolina, and *Theodore C. Brown, Jr.*, for respondent.

No. 623, Misc. MEAD *v.* CALIFORNIA. Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 626, Misc. HAWKINS *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 627, Misc. GREGOIRE ET UX. *v.* NATIONAL BANK OF ALASKA. Sup. Ct. Alaska. Certiorari denied. *Edgar Paul Boyko* for petitioners. Reported below: 413 P. 2d 27.

No. 628, Misc. WARD *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied. Reported below: 64 Cal. 2d 672, 414 P. 2d 400.

No. 631, Misc. JORDAN *v.* MARKLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 642, Misc. HAMILTON *v.* HAMILTON. Ct. App. Md. Certiorari denied. *Louis A. Scholz* for petitioner. Reported below: 242 Md. 240, 218 A. 2d 684.

Rehearing Denied.

No. 1291, October Term, 1965. TAUB *v.* HALE, AKA RANDOLPH HALE-ALCAZAR THEATRE, ET AL., 384 U. S. 1007. Motions for leave to file supplements to petition for rehearing denied. Rehearing denied.

No. 574. MASLOWSKY ET AL. *v.* CASSIDY, CHAIRMAN, ILLINOIS HOUSE OF REPRESENTATIVES COMMISSION, ET AL., *ante*, p. 11. Rehearing denied.

OCTOBER 28, 1966.

Dismissal Under Rule 60.

No. 612. UNITED STATES FOR THE USE AND BENEFIT OF CAPOLINO SONS, INC. *v.* ELECTRONIC & MISSILE FACILITIES, INC., ET AL. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Jack E. Levine* for petitioner. Reported below: 364 F. 2d 705.

NOVEMBER 7, 1966.

Miscellaneous Orders.

No. 80. SHERMAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. (Certiorari granted, 384 U. S. 904.) Motion of Frank C. Newman et al., for leave to file brief, as *amici curiae*, granted. *Frank C. Newman, pro se*, on the motion.

No. 70. REED *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. (Certiorari granted, 382 U. S. 1025. Argued October 18, 1966.) Motion of petitioner for leave to file supplemental brief, after argument, denied. *Charles W. Tessmer, Clyde W. Woody* and *Emmett Colvin, Jr.*, on the motion.

No. 114. VACA ET AL. *v.* SIPES, ADMINISTRATOR. Sup. Ct. Mo. (Certiorari granted, 384 U. S. 969.) Motions of American Federation of Labor and Congress of Industrial Organizations and Swift & Co. for leave to file briefs, as *amici curiae*, granted. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for AFL–CIO, and *Robert L. Hecker* and *Earl G. Spiker* for Swift & Co. on the motions.

No. 173. COMMISSIONER OF INTERNAL REVENUE *v.* STIDGER ET UX. C. A. 9th Cir. (Certiorari granted, *ante*, p. 809.) *John A. Reed, Esquire*, of New York, N. Y., a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below.

No. 871, Misc. CORTINEZ *v.* FLOURNOY, SHERIFF. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE STEWART would treat the papers submitted as a petition for writ of certiorari, and would grant certiorari.

No. 681, Misc. DOWD *v.* ALABAMA;

No. 691, Misc. SAUNDERS *v.* REUSS, CLERK, ET AL.; and

No. 708, Misc. SHIPP *v.* SUPREME COURT OF CALIFORNIA. Motions for leave to file petitions for writs of mandamus denied.

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No. 393, Misc. SNOW *v.* WAINRIGHT, CORRECTIONS DIRECTOR;

No. 771, Misc. ANDERSON *v.* CALIFORNIA; and

No. 804, Misc. IN RE ORTEGA. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (See also No. 1029, October Term, 1965, *ante*, p. 26.)

No. 462. WASHINGTON PUBLIC POWER SUPPLY SYSTEM *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Motions of Pacific Northwest Power Co. and the State of Oregon to be added as parties respondent granted. Certiorari granted and case set for oral argument immediately following No. 463. *Northcutt Ely* for petitioner. *Richard A. Solomon, Howard E. Wahrenbrock, Peter H. Schiff* and *Joel Yohalem* for Federal Power Commission; *Francis M. Shea, William H. Dempsey, Jr.*, and *Ralph J. Moore, Jr.*, for Pacific Northwest Power Co.; and *Robert Y. Thornton*, Attorney General, and *Richard W. Sabin* and *Leon L. Hagan*, Assistant Attorneys General, for the State of Oregon, respondents. *Allan G. Shepard*, Attorney General of Idaho, and *T. J. Jones III* for Idaho Fish and Game Commission; and *Joseph T. Mijich* for Washington State Sportsmen's Council, Inc., et al., intervenors below, in opposition to the petition. Reported below: 123 U. S. App. D. C. 209, 358 F. 2d 840.

No. 480. WARDEN, MARYLAND PENITENTIARY *v.* HAYDEN. C. A. 4th Cir. Certiorari granted. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. *Thomas B. Finan*, Attorney General of Maryland, and *Franklin Goldstein*, Assistant Attorney General, for petitioner. *Thomas S. Currier* for respondent. Reported below: 363 F. 2d 647.

No. 440. BOUTILIER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Blanch Freedman* and *Robert Brown* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 363 F. 2d 488.

No. 463. UDALL, SECRETARY OF THE INTERIOR *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Weisl, Louis F. Claiborne, Richard A. Posner, Roger P. Marquis, S. Billingsley Hill, Frank J. Barry, Edward Weinberg, Harry Hogan* and *Ernest J. London* for petitioner. *Richard A. Solomon, Howard E. Wahrenbrock, Peter H. Schiff* and *Joel Yohalem* for Federal Power Commission; *Francis M. Shea, William H. Dempsey, Jr.,* and *Ralph J. Moore, Jr.,* for Pacific Northwest Power Co.; *Robert Y. Thornton,* Attorney General, and *Richard W. Sabin* and *Leon L. Hagan,* Assistant Attorneys General, for the State of Oregon; *Allan G. Shepard,* Attorney General of Idaho, and *T. J. Jones III* for Idaho Fish and Game Commission; and *Joseph T. Mijich* for Washington State Sportsmen's Council, Inc., et al., respondents. Reported below: 123 U. S. App. D. C. 209, 358 F. 2d 840.

Certiorari Denied. (See also No. 630, Misc., *ante,* p. 36; No. 686, Misc., *ante,* p. 36; and No. 871, Misc., *supra.*)

No. 245. DAVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Neal Rutledge, Allan Milledge, Lester P. Schoene, Hilton R. Carr, Jr., Herbert A. Warren, Jr.,* and *Grant Stetter* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 357 F. 2d 438.

No. 345. HICKEY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 360 F. 2d 127.

No. 417. KLITZNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *W. Stuart McCloy* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent.

No. 447. ROBILLARD ET AL. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Shirley Fingerhood* for petitioners. *Frank S. Hogan* for respondent.

No. 451. KERESTES *v.* UNITED STATES; and

No. 455. SOPHER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner in No. 451. *Charles A. Bellows* for petitioners in No. 455. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States in both cases. Reported below: 362 F. 2d 523.

No. 466. OIL BASE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Wilson B. Copes* and *Wellman P. Thayer* for petitioner. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 362 F. 2d 212.

No. 468. LASCHER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Dan Kaufmann*, Assistant Attorney General, and *A. Wallace Tashima*, Deputy Attorney General, for respondent. Reported below: 64 Cal. 2d 687, 414 P. 2d 398.

No. 465. EMINENTE *v.* JOHNSON ET AL. C. A. D. C. Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 124 U. S. App. D. C. 56, 361 F. 2d 73.

No. 467. OMICINI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Alvin M. Cibula* for petitioner.

No. 469. LAYTON ET AL. *v.* SELB MANUFACTURING CO. ET AL. C. A. 8th Cir. Certiorari denied. *Jerome J. Duff* for petitioners. *J. Leonard Schermer* for Selb Manufacturing Co. et al., and *Donald S. Siegel* for International Association of Machinists, District No. 9, respondents. Reported below: 359 F. 2d 715.

No. 470. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Herbert S. Thatcher* and *David Previant* for petitioners. *Solicitor General Marshall* for National Mediation Board et al., and *Edward J. Hickey, Jr.*, and *James L. Highsaw, Jr.*, for Brotherhood of Railway & Steamship Clerks, respondents. Reported below: 124 U. S. App. D. C. 182, 363 F. 2d 311.

No. 471. MILLER *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *A. Donald Mileur* for respondent.

No. 472. CHAUFFEURS, TEAMSTERS & HELPERS "GENERAL" LOCAL NO. 200 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *David Leo Uelmen* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent.

No. 474. HOME SHIPPING CO., S. A., AS OWNER OF THE COSMIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Eli Ellis* and *David C. Wood* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 435.

No. 476. WOODARDS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon* and *Joshua J. Kancelbaum* for petitioner. *Paul J. Mikus* and *John B. Otero* for respondent. Reported below: 6 Ohio St. 2d 14, 215 N. E. 2d 568.

No. 478. CHEWNING ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Roger Q. White* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 363 F. 2d 441.

No. 479. FINDLAY ET AL. *v.* DAVID B. FINDLAY, INC., ET AL. Ct. App. N. Y. Certiorari denied. *Milton Pollack* for petitioners. *J. Kenneth Campbell* for respondents. Reported below: 18 N. Y. 2d 12, 218 N. E. 2d 531.

No. 484. ALLSTATE INSURANCE CO. ET AL. *v.* LANIER, COMMISSIONER OF INSURANCE FOR NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. *Herbert A. Bergson, Howard Adler, Jr.,* and *Donald L. Hardison* for petitioners. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Charles D. Barham, Jr.,* Assistant Attorney General, for respondent. Reported below: 361 F. 2d 870.

No. 485. OTTO *v.* MAYOR OF DAYTON ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Edwin L. Roe* for respondents.

No. 482. MARYLAND FOR THE USE OF COSTAS ET AL. *v.* ATLANTIC AVIATION CORP. C. A. 3d Cir. Certiorari denied. *Theodore E. Wolcott* for petitioners. *Donald A. Robinson* for respondent. Reported below: 361 F. 2d 873.

No. 487. WILLIAMS *v.* ANDERSON. C. A. 3d Cir. Certiorari denied. *Louis Lipschitz* for petitioner. Reported below: 361 F. 2d 335.

No. 489. KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE *v.* PETROL SHIPPING CORP. C. A. 2d Cir. Certiorari denied. *Arthur M. Becker* for petitioner. *Eli Ellis* for respondent. Reported below: 360 F. 2d 103.

No. 490. AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. ET AL. *v.* AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. Ct. App. N. Y. Certiorari denied. *Herbert Brownell* for petitioners. *Clarence Fried* for respondent.

No. 492. SMITH, ADMINISTRATRIX *v.* UNION OIL CO., INC., ET AL. Sup. Ct. Cal. Certiorari denied. *Ellis J. Horvitz* for petitioner. *L. Robert Wood* for respondents.

No. 493. RALPH ET AL. *v.* TIDEWATER CONSTRUCTION CORP. ET AL. C. A. 4th Cir. Certiorari denied. *Henry E. Howell, Jr.*, for petitioners. *George D. Gibson* and *E. Milton Farley III* for respondents. Reported below: 361 F. 2d 806.

No. 494. HAINE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Elmer Fried* for petitioner. *Solicitor General Marshall* for the United States.

No. 506. DEPARTMENT OF FISH AND GAME OF CALIFORNIA *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 569. PACIFIC POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, and *Burton J. Gindler*, Deputy Attorney General, for petitioner in No. 506. *Gregory A. Harrison* and *Malcolm T. Dungan* for petitioner in No. 569. *Solicitor General Marshall*, *Richard A. Solomon*, *Howard A. Wahrenbrock* and *Joseph B. Hobbs* for Federal Power Commission, respondent in both cases.

Brief of *amici curiae*, in support of the petition in No. 506, was filed by: *Darrell F. Smith*, Attorney General, and *Jordan Green*, Assistant Attorney General, for the State of Arizona; *Arthur K. Bolton*, Attorney General, and *George J. Hearn III* and *Marshall R. Sims*, Assistant Attorneys General, for the State of Georgia; *Allan G. Shepard*, Attorney General, and *T. J. Jones III* for the State of Idaho; *Lawrence F. Scalise*, Attorney General, and *Robert B. Scism*, Assistant Attorney General, for the State of Iowa; *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Nicholas V. Olds*, Assistant Attorney General, for the State of Michigan; *Harvey Dickerson*, Attorney General, and *Daniel J. Olguin*, Deputy Attorney General, for the State of Nevada; *T. Wade Bruton*, Attorney General, and *Millard R. Rich, Jr.*, Assistant Attorney General, for the State of North Carolina; *Charles Nesbitt*, Attorney General, and *Joseph C. Muskrat*, Assistant Attorney General, for the State of Oklahoma; *Robert Y. Thornton*, Attorney General, and *George S. Woodworth*, Assistant Attorney General, for the State of Oregon; *Edward Friedman*, Attorney General, and *Richard H. Kutz*, Deputy Attorney General, for the Commonwealth of Pennsylvania; *Frank L. Farrar*, Attorney General, for the State of South Dakota; *Robert Y. Button*, Attorney General,

and *Kenneth C. Patty*, First Assistant Attorney General, for the Commonwealth of Virginia; and *John J. O'Connell*, Attorney General, and *Joseph L. Coniff*, *Mike Johnston* and *John R. Miller*, Assistant Attorneys General, for the State of Washington. Reported below: 359 F. 2d 165.

No. 498. LIPSETT STEEL PRODUCTS, INC. *v.* MOSLEY ET AL.; and

No. 550. CIA. MAR. ADRA, S. A. *v.* MOSLEY. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner in No. 498. *Victor S. Cichanowicz* for petitioner in No. 550 and for Cia. Mar. Adra, S. A., respondent in No. 498. *George J. Engelman* for Mosley, respondent in both cases. Reported below: 362 F. 2d 118.

No. 499. NEW MEXICO PUBLIC SERVICE COMMISSION ET AL. *v.* COMMUNITY PUBLIC SERVICE CO. Sup. Ct. N. M. Certiorari denied. *Boston E. Witt*, Attorney General of New Mexico, *Leland Stone*, Special Assistant Attorney General, and *William M. Siegenthaler* for petitioners. *Ross L. Malone* and *Bennett L. Smith* for respondent. Reported below: 76 N. M. 314, 414 P. 2d 675.

No. 501. KINDELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *William E. Ladin* for petitioner.

No. 503. BEAR SALES CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Charles Rowan* and *Willis Hagen* for petitioners. *Solicitor General Marshall* and *James McI. Henderson* for respondent. Reported below: 362 F. 2d 96.

No. 514. BRONNER *v.* GOLDMAN ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *John F. X. Gaquin* for respondents. Reported below: 361 F. 2d 759.

No. 504. SCHIPANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob P. Lefkowitz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 362 F. 2d 825.

No. 509. DEVERS *v.* CAPITAL INVESTORS CO. ET AL. C. A. 4th Cir. Certiorari denied. *Josiah Lyman* and *Wallace L. Schubert* for petitioner. *Keith L. Seegmiller* for respondent Capital Investors Co., and *Joseph B. Hyman* for respondent Morrison. Reported below: 360 F. 2d 462.

No. 510. STEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Henry Klepak* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *John M. Brant* for the United States. Reported below: 363 F. 2d 587.

No. 512. NOEL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *J. Frederick Hoffman* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 215 N. E. 2d 539.

No. 515. GULLO *v.* LAMBERT ET AL. C. A. D. C. Cir. Certiorari denied. *Joseph Samuel Gullo* for petitioner.

No. 520. NEWTON ET AL. *v.* SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INC., ET AL. C. A. 4th Cir. Certiorari denied. *Ernest F. Hollings* for petitioners. *Lynn C. Paulson* and *H. W. C. Furman* for respondents. Reported below: 360 F. 2d 414.

No. 524. IZZI *v.* REZZOLLA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 420 Pa. 643, 218 A. 2d 916.

No. 523. WINN-DIXIE STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *O. R. T. Bowden* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 361 F. 2d 512.

No. 531. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. *v.* RYAN ET AL. C. A. 7th Cir. Certiorari denied. *Louis Sherman, Lester Asher, Benjamin L. Jacobson* and *Charles R. Donnenfeld* for petitioners. *William S. Grotefeld* for respondents. Reported below: 361 F. 2d 942.

No. 244. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* JACKSONVILLE TERMINAL CO. ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Neal Rutledge* and *Allan Milledge* for petitioners. *Paul A. Porter, Abe Krash, Dennis G. Lyons* and *Daniel A. Rezneck* for respondent Jacksonville Terminal Co.

No. 507. KAHN *v.* FOX. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Thurman Arnold* for petitioner. Reported below: 421 Pa. 563, 221 A. 2d 181.

No. 186, Misc. ROACH *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *L. Hugh Kemp* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, and *G. Ernest Tidwell,* Executive Assistant Attorney General, for respondent. Reported below: 221 Ga. 783, 147 S. E. 2d 299.

No. 180, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States.

No. 192, Misc. FRAYER *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Petitioner *pro se*. *Ronald N. Boyce*, Assistant Attorney General of Utah, for respondent. Reported below: 17 Utah 2d 288, 409 P. 2d 968.

No. 206, Misc. BOOTH *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Paul J. Murphy*, Assistant Attorneys General, for respondent.

No. 207, Misc. BRAWNER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *John H. Ruffin, Jr.*, for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, and *G. Ernest Tidwell*, Executive Assistant Attorney General, for respondent.

No. 209, Misc. MCDONALD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Benjamin F. Napheys, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 356 F. 2d 980.

No. 267, Misc. NEW YORK EX REL. ANONYMOUS *v.* LA BURT, STATE HOSPITAL DIRECTOR. Ct. App. N. Y. Certiorari denied. *Morton Birnbaum* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, for respondent. Reported below: 17 N. Y. 2d 738, 217 N. E. 2d 31.

No. 212, Misc. SNIEDZINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 354 F. 2d 1004.

No. 219, Misc. MASON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Wallace E. Allbritton*, Assistant Attorney General, for respondent.

No. 288, Misc. BELK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Petitioner *pro se*. *Robert Matthews*, Attorney General of Kentucky, and *Joseph H. Eckert*, Assistant Attorney General, for respondent.

No. 306, Misc. COTA *v.* EYMAN, WARDEN. Sup. Ct. Ariz. Certiorari denied. Petitioner *pro se*. *Darrell F. Smith*, Attorney General of Arizona, and *James S. Tegart*, Assistant Attorney General, for respondent.

No. 330, Misc. BATES *v.* MEADOWS, ACTING WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Henry C. Foutch*, Assistant Attorney General of Tennessee, and *Ed R. Davies* for respondent. Reported below: 358 F. 2d 674.

No. 446, Misc. CANTRELL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 448, Misc. ANDREWS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent.

No. 474, Misc. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Joe B. Goodwin* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender,* Assistant Attorney General, for respondent. Reported below: 403 S. W. 2d 145.

No. 489, Misc. FERGUSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Charles E. Keller* for petitioner. Reported below: 401 S. W. 2d 225.

No. 544, Misc. LANCASTER *v.* FOGLIANI, WARDEN. Sup. Ct. Nev. Certiorari denied. Petitioner *pro se. Harvey Dickerson,* Attorney General of Nevada, for respondent.

No. 546, Misc. RIVERA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Milton Eisenberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 124 U. S. App. D. C. 99, 361 F. 2d 553.

No. 554, Misc. LA VERGNE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *A. Lee Estep* for petitioner. Reported below: 64 Cal. 2d 265, 411 P. 2d 309.

No. 560, Misc. SMITH *v.* CAVELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 581, Misc. TOWNSEND *v.* OGILVIE, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. *William R. Ming, Jr.,* for petitioner. *Daniel P. Ward* and *Edward J. Hladis* for respondents. Reported below: 360 F. 2d 925.

No. 600, Misc. SCHNEPP *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Petitioner *pro se*. *Harvey Dickerson*, Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 82 Nev. 257, 415 P. 2d 619.

No. 602, Misc. WALDON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 155.

No. 613, Misc. COX *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 361 F. 2d 183.

No. 643, Misc. KOSTAL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Donald P. MacDonald* for petitioner. Reported below: — Colo. —, 414 P. 2d 123.

No. 647, Misc. HOWARD *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 649, Misc. MONTAYNE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. *George H. Searle* for petitioner.

No. 651, Misc. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 654, Misc. BRAXTON *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 365 F. 2d 563.

No. 656, Misc. CERNY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 658, Misc. SPIESEL *v.* ROOS. C. A. 2d Cir. Certiorari denied.

No. 660, Misc. AVEY *v.* BOSLOW, INSTITUTION DIRECTOR, ET AL. Ct. App. Md. Certiorari denied. *Karl G. Feissner* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, and *Franklin Goldstein,* Assistant Attorney General, for respondent. Reported below: 243 Md. 16, 221 A. 2d 397.

No. 662, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Francis Conklin* for petitioner.

No. 665, Misc. WEBB *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 362 F. 2d 105.

No. 670, Misc. LUDWIG *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 671, Misc. SPRY *v.* OBERHAUSER ET AL. Sup. Ct. Cal. Certiorari denied.

No. 674, Misc. MOORE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 675, Misc. TRAILOR *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 676, Misc. HOGUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 678, Misc. ALLEN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 682, Misc. CARROLL *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 361 F. 2d 903.

No. 680, Misc. RUCKER *v.* JOHNSON, CLERK OF DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 685, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 688, Misc. STORCH *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 363 F. 2d 149.

No. 692, Misc. HILLIARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Bernard A. Golding* for petitioner. Reported below: 401 S. W. 2d 814.

No. 697, Misc. TUGGLE *v.* BROWN, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Acting Assistant Attorney General Doolittle* and *David L. Rose* for respondent. Reported below: 362 F. 2d 801.

No. 700, Misc. PORTER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 702, Misc. TITUS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 107 N. H. 215, 220 A. 2d 154.

No. 706, Misc. DANA *v.* TRACY, SHERIFF. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *George C. West*, Deputy Attorney General of Maine, for respondent. Reported below: 360 F. 2d 545.

No. 709, Misc. ELLIOTT *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 241 Cal. App. 2d 659, 50 Cal. Rptr. 757.

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No. 715, Misc. HOFFMAN *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 721, Misc. MASUCCI *v.* HARRISON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 728, Misc. HUSKEY *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 733, Misc. ASBERRY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 552, Misc. CLARKE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James H. Bateman* and *Charles Galbreath* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent. Reported below: — Tenn. —, 402 S. W. 2d 863.

No. 635, Misc. CALLAHAN *v.* INDIANA. Sup. Ct. Ind. Motion for leave to supplement the petition granted. Certiorari denied. *William C. Erbecker* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Michael V. Gooch,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 214 N. E. 2d 648.

No. 693, Misc. SKOLNICK *v.* PUCETTI ET AL. Sup. Ct. Ill. Petition for writ of certiorari and for other relief denied.

Rehearing Granted. (See No. 1029, October Term, 1965, *ante,* p. 26.)

Rehearing Denied.

No. 407. NEELY *v.* HOUSTON OILERS, INC., *ante,* p. 840. Petition for rehearing and application for stay or injunction prohibiting trial court from obeying mandate denied.

No. 146. DELANEY *v.* UNITED SERVICES LIFE INSURANCE CO., *ante*, p. 846;

No. 332. BOOKCASE, INC., ET AL. *v.* LEARY, COMMISSIONER OF POLICE OF THE CITY OF NEW YORK, ET AL., *ante*, p. 12;

No. 262, Misc. NORRIS *v.* UNITED STATES, *ante*, p. 871;

No. 411, Misc. HOARD *v.* DUTTON, ACTING WARDEN, ET AL., *ante*, p. 881;

No. 450, Misc. MCCOY *v.* PRESTON, *ante*, p. 805;

No. 481, Misc. TSERMENGAS *v.* KROPP, WARDEN, *ante*, p. 805;

No. 502, Misc. COMLEY *v.* UNITED STATES, *ante*, p. 885; and

No. 509, Misc. BELCHER *v.* CALIFORNIA, *ante*, p. 886. Petitions for rehearing denied.

NOVEMBER 9, 1966.

Dismissal Under Rule 60.

No. 896, Misc. DAVIS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 14, 1966.

Miscellaneous Orders.

No. 216. NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL. C. A. 7th Cir. (Certiorari granted, *ante*, p. 810.) Motion to remove case from summary calendar denied. *Joseph L. Rauh, Jr.*, *John Silard* and *Stephen I. Schlossberg* for International Union, UAW–AFL–CIO (Locals 248 and 401), on the motion.

No. 136. SWANN ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. (Probable jurisdiction noted, *ante*, p. 808.) Motion of John A. Davis et al. for leave to participate in oral argument, as *amici curiae*, denied. *David Popper, Stewart D. Allen* and *John M. Dyer* on the motion.

No. 555. RAINWATER ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 648. CLEWIS *v.* TEXAS. Ct. Crim. App. Tex. (Certiorari granted, *ante*, p. 814.) Motion for the appointment of counsel granted, and it is ordered that *Reagan H. Legg, Esquire*, of Midland, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 828, Misc. WOOTEN *v.* HENDERSON, WARDEN;

No. 839, Misc. HARDISON *v.* DUNBAR, CORRECTIONS DIRECTOR; and

No. 853, Misc. POPE *v.* PARKER, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 832, Misc. GRETSINGER *v.* WILSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as petition for writ of certiorari, certiorari denied.

No. 750, Misc. HITE *v.* HOLMAN, WARDEN, ET AL.;

No. 801, Misc. BIGGS *v.* CAMPBELL, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL.;

No. 825, Misc. HOLLINGSHEAD *v.* SUPREME COURT OF FLORIDA; and

No. 826, Misc. LAWRENCE *v.* TEXAS. Motions for leave to file petitions for writs of mandamus denied.

No. 813, Misc. FURTAK *v.* MANCUSI, WARDEN. Motion for leave to file petition for writ of mandamus and for other relief denied.

Certiorari Granted. (See No. 477, *ante*, p. 92.)

Certiorari Denied. (See No. 473, *ante*, p. 97; No. 669, Misc., *ante*, p. 96; and No. 832, Misc., *supra*.)

No. 508. FLYING TIGER LINE, INC. *v.* MURPHY ET AL. C. A. D. C. Cir. Certiorari denied. *Myer Feldman* and *Alvin Friedman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Sanders, David L. Rose, Harvey L. Zuckman* and *Joseph B. Goldman* for Murphy et al., and *Warren E. Baker* for Trans World Airlines, Inc., respondents.

No. 511. HIGGINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham* and *Charles B. Evins* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 362 F. 2d 462.

No. 517. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 533. MENE GRANDE OIL CO. *v.* MOBIL TANKERS CO., S. A., ET AL. C. A. 3d Cir. Certiorari denied. *Eugene Underwood* for petitioner. *Leslie C. Krusen* for respondents. Reported below: 363 F. 2d 611.

No. 537. MARSHALL ET AL. *v.* OLIVER, PRESIDENT OF RICHMOND PROFESSIONAL INSTITUTE, ET AL. Sup. Ct. App. Va. Certiorari denied. *Howard H. Carwile* for petitioners.

No. 532. RETAIL LIQUOR DEALERS ASSOCIATION OF LOUISIANA, INC., ET AL. *v.* REYNOLDS, DBA LARRY & KATZ, ET AL. Sup. Ct. La. Certiorari denied. *Benjamin H. Dorsey* for petitioners. *Saul Stone* and *Paul O. H. Pigman* for respondents. Reported below: 249 La. 127, 185 So. 2d 794.

No. 534. SPENCE, DBA GEFF SEED & GRAIN CO. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Leslie N. Jones* for petitioner. *Hugh J. Graham, Jr.*, for respondent. *George E. Merker, Jr.*, for Illinois Agricultural Association, as *amicus curiae*, in support of the petition. Reported below: 360 F. 2d 887.

No. 535. CONTINENTAL CAN CO., INC. *v.* DONAHUE, TAX COMMISSIONER OF OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. *Helmer R. Johnson* for petitioner. *William B. Saxbe*, Attorney General of Ohio, *Gerald A. Donahue*, First Assistant Attorney General, and *Edgar L. Lindley*, Assistant Attorney General, for respondents. Reported below: 5 Ohio St. 2d 224, 215 N. E. 2d 400.

No. 538. POTTS ET AL. *v.* MCCASTLAIN, COMMISSIONER OF REVENUES OF ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Nathan L. Schoenfeld* and *William Nash* for petitioners. Reported below: 240 Ark. 603, 401 S. W. 2d 220.

No. 541. AKERSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Eugene Gressman* and *Damon M. Gunn* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Doolittle, David L. Rose* and *Frederick B. Abramson* for the United States. *Robert F. Klepinger* for Andrews et al., as *amici curiae*, in support of the petition. Reported below: 175 Ct. Cl. 551.

No. 536. GENITE *v.* CIVIL SERVICE COMMISSION OF TOLEDO ET AL. Sup. Ct. Ohio. Certiorari denied. *James F. Bell* for petitioner. *Frank T. Pizza* and *John J. Burkhart* for respondents.

No. 540. SCHILLER *v.* LEFKOWITZ. Ct. App. Md. Certiorari denied. *Charles W. Bell* for petitioner. *John M. McInerney, Wilbert McInerney, Richard B. Latham* and *Edward B. Layne, Jr.*, for respondent. Reported below: 242 Md. 461, 219 A. 2d 378.

No. 542. E. W. WIGGINS AIRWAYS, INC. *v.* MASSACHUSETTS PORT AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. *Douglas L. Ley* for petitioner. *Warren F. Farr* for Massachusetts Port Authority, and *John M. Hall, Conrad W. Oberdorfer* and *John R. Hally* for Butler Aviation-Boston, Inc., et al., respondents. Reported below: 362 F. 2d 52.

No. 553. MCALLISTER BROTHERS, INC. *v.* TANKERS & TRAMPS CORP. C. A. 2d Cir. Certiorari denied. *Christopher E. Heckman* for petitioner. *Melvin J. Tublin* for respondent. Reported below: 358 F. 2d 896.

No. 566. LEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Bernard J. Mellman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 363 F. 2d 469.

No. 554. INTERNATIONAL BROTHERHOOD OF TELEPHONE WORKERS *v.* LOCAL NO. 2, INTERNATIONAL BROTHERHOOD OF TELEPHONE WORKERS. C. A. 1st Cir. Certiorari denied. *Joseph T. Doyle* and *Reuben Goodman* for petitioner. Reported below: 362 F. 2d 891.

No. 552. ZEGERS, INC. *v.* ZEGERS. C. A. 7th Cir. Certiorari denied. *Thomas F. McWilliams* for petitioner. *Daniel V. O'Keeffe* for respondent. Reported below: 365 F. 2d 156.

No. 557. PACELLI *v.* UNITED STATES;

No. 593. KAHN *v.* UNITED STATES; and

No. 594. SCHAWARTZBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Kasanof* and *Albert J. Krieger* for petitioner in No. 557. *Frances Kahn*, petitioner, *pro se*, in No. 593. Petitioner *pro se* in No. 594. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States in all three cases. Reported below: 366 F. 2d 259.

No. 559. DRISCOLL *v.* TOLEDO BLADE CO. Sup. Ct. Ohio. Certiorari denied. *Melvin M. Belli* and *William D. Driscoll, pro se*, for petitioner. *Arnold F. Bunge* and *Dan H. McCullough* for respondent.

No. 561. BERNER ET AL., EXECUTORS *v.* BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., ET AL. C. A. 2d Cir. Certiorari denied. *T. Roland Berner, pro se*, and for other petitioner. Reported below: 362 F. 2d 799.

No. 563. NATIONAL SCREEN SERVICE CORP. *v.* POSTER EXCHANGE, INC. C. A. 5th Cir. Certiorari denied. *Louis Nizer* for petitioner. *Francis T. Anderson* for respondent. Reported below: 362 F. 2d 571.

No. 565. HIATT *v.* SAN FRANCISCO NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. *Coleman J. Lesser* for petitioner. *Roy A. Bronson, John F. Lee* and *Leslie H. Fisher* for respondents. Reported below: 361 F. 2d 504.

No. 567. KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC. C. A. 10th Cir. Certiorari denied. *Steven E. Keane* and *William A. Denny* for petitioner. *Jack N. Hays* and *Charles Clark* for respondent.

No. 518. PAINTER *v.* BANNISTER ET UX. Sup. Ct. Iowa. Motions of Board of Christian Social Concerns, New York Annual Conference of the Methodist Church, and American Civil Liberties Union et al., for leave to file briefs, as *amici curiae*, granted. Certiorari denied. *William H. Allen, Brice M. Clagett, John E. Vanderstar* and *Donald R. Payer* for petitioner. *John L. Butler* and *Jack A. Hall* for respondents. *Randolph J. Seifert* for Board of Christian Social Concerns, New York Annual Conference of the Methodist Church, and *Ephraim London* for American Civil Liberties Union et al., on the motions in support of the petition. *Thomas C. Lynch*, Attorney General, and *Elizabeth Palmer*, Deputy Attorney General, for the State of California, as *amicus curiae*, in support of the petition. Reported below: 258 Iowa 1390, 140 N. W. 2d 152.

No. 558. HAWKINS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Jack Greenberg, Anthony G. Amsterdam* and *Charles V. Bell* for petitioner. *T. Wade Bruton*, Attorney General of North Carolina, and *Theodore C. Brown, Jr.*, for respondent. Reported below: 365 F. 2d 559.

No. 173, Misc. LEEK *v.* COPINGER, WARDEN. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Robert C. Murphy*, Attorney General of Maryland, and *Julius A. Romano*, Assistant Attorney General, for respondent. Reported below: 353 F. 2d 526.

No. 556. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* FLORIDA EAST COAST RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Clark W. Toole, Jr.*, and *John S. Cox* for petitioners. *Chester Bedell* for respondent. Reported below: 363 F. 2d 216.

No. 161, Misc. LANE *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, for respondent.

No. 199, Misc. WOODS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Alvin J. Korobkin*, Deputy Attorney General, for respondent.

No. 264, Misc. SHANNON *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Certiorari denied. Petitioner *pro se*. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 243 Ore. 334, 413 P. 2d 418.

No. 319, Misc. HALL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent.

No. 345, Misc. GHOLSTON *v.* BOLES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *Leo Catsonis* and *J. Stephen Max*, Assistant Attorneys General, for respondent.

No. 441, Misc. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 347, Misc. McCLOSKEY *v.* BOSLOW, INSTITUTION DIRECTOR. Ct. App. Md. Certiorari denied. Petitioner *pro se*. *Robert C. Murphy*, Attorney General of Maryland, and *Alfred J. O'Ferrall III*, Assistant Attorney General, for respondent. Reported below: 242 Md. 717, 219 A. 2d 4.

No. 435, Misc. RODRIGUEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Rose-Marie Gruenwald*, Deputy Attorney General, for respondent.

No. 475, Misc. RANSOM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 499, Misc. RIOJAS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. *Jimi Mitsunaga* and *George H. Searle* for petitioner. *Phil L. Hansen*, Attorney General of Utah, for respondent. Reported below: 17 Utah 2d 416, 413 P. 2d 804.

No. 528, Misc. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 542, Misc. STIDHAM *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied. Petitioner *pro se*. *Norman H. Anderson*, Attorney General of Missouri, and *Donald L. Randolph*, Assistant Attorney General, for respondent.

No. 633, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 565, Misc. LYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 1010.

No. 687, Misc. CANTRELL *v.* FIELD, MENS COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 703, Misc. REEVES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 64 Cal. 2d 766, 415 P. 2d 35.

No. 711, Misc. HAGINS *v.* REDEVELOPMENT COMMISSION OF GREENSBORO. Sup. Ct. N. C. Certiorari denied. *Samuel S. Mitchell* for petitioner. Reported below: 267 N. C. 622, 148 S. E. 2d 585.

No. 713, Misc. KING *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 722, Misc. COLEY *v.* BAILEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 724, Misc. JONES *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 416 P. 2d 540.

No. 726, Misc. BLOCKYOU *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 364 F. 2d 804.

No. 727, Misc. HUNTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 753, Misc. LUTSKY *v.* LUTSKY. Sup. Ct. Ala. Certiorari denied. Reported below: 279 Ala. 185, 183 So. 2d 782.

No. 737, Misc. FAGANS *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 746, Misc. WHELCHEL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 747, Misc. PADILLA *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 772, Misc. KERRIGAN *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *John J. Droney, Richard S. Kelley* and *Ruth Abrams* for respondent. Reported below: 364 F. 2d 759.

No. 773, Misc. EDGE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 802, Misc. EVANS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *John N. Crudup* for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, and *Harold N. Hill, Jr.*, and *Alfred L. Evans, Jr.*, Assistant Attorneys General, for respondent. Reported below: 222 Ga. 392, 150 S. E. 2d 240.

Rehearing Denied.

No. 145. ROEHNER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL., *ante*, p. 818;

No. 157. KOLITCH ET AL. *v.* NEW YORK, *ante*, p. 819;

No. 205. MARATHON OIL CO. *v.* HEATH ET AL., *ante*, p. 824;

No. 268. PARTIN *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 829;

No. 349. FORESTER *v.* UNITED STATES, *ante*, p. 837; and

No. 404. VILLAFRANCA ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 840. Petitions for rehearing denied.

No. 61, Misc. COLBERT *v.* UNITED STATES, *ante*, p. 855;

No. 97, Misc. SLIVA *v.* PENNSYLVANIA, *ante*, p. 858;

No. 227, Misc. BATES *v.* VETERANS ADMINISTRATION ET AL., *ante*, p. 868;

No. 265, Misc. WHITE *v.* FORTE ET AL., *ante*, p. 871;

No. 368, Misc. CEDILLO *v.* UNITED STATES, *ante*, p. 805;

No. 419, Misc. GREENWAY *v.* UNITED STATES, *ante*, p. 881;

No. 424, Misc. HUNT *v.* OLIVER, WARDEN, *ante*, p. 904;

No. 460, Misc. HARTFORD *v.* UNITED STATES, *ante*, p. 883;

No. 480, Misc. MABE *v.* PILSON, *ante*, p. 884;

No. 490, Misc. GRADDY *v.* TESSEL ET AL., *ante*, p. 885;

No. 495, Misc. JONES *v.* UNITED STATES, *ante*, p. 885; and

No. 500, Misc. BROWN *v.* BOLES, WARDEN, *ante*, p. 886. Petitions for rehearing denied.

NOVEMBER 15, 1966.

Dismissal Under Rule 60.

No. 74. FORTUGNO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 75. ESTATE OF FORTUGNO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. (Certiorari granted, 384 U. S. 959.) Writs of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Harry Rand* and *Anthony C. Manzella* for petitioners in both cases. *Solicitor General Marshall* for respondent in both cases. Reported below: 353 F. 2d 429.

NOVEMBER 17, 1966.

Dismissal Under Rule 60.

No. 637, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 21, 1966.

Miscellaneous Orders.

No. —. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MORRIS ET AL.

Notice of appeal having been filed in the above case from the judgment of the United States District Court for the Northern District of Georgia, and an application for a stay of that judgment pending disposition of the appeal having been presented to MR. JUSTICE BLACK, and by him referred to the Court under Rule 50 (6), the stay is granted, pending the issuance of the judgment of this Court.

All of the parties to the proceeding having requested acceleration of the appeal, the following schedule for further proceedings is adopted: The appellant shall perfect his appeal, file a statement as to jurisdiction, the certified record and his brief on the merits on or before Friday, November 25, 1966. The appellees shall file such motions under Rule 16 (1) as they desire and their briefs on the merits, also on November 25, 1966. Reply briefs by all parties may be filed on or before December 2, 1966. The Court will hear argument on all matters involved on December 5, 1966. The case will be heard on the typewritten record, but any of the parties may print as appendices to their briefs such portions of the record as they desire. The statement as to jurisdiction, motions and briefs may be submitted in typewritten form and printed copies substituted thereafter.

Arthur K. Bolton, Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, *Harold N. Hill, Jr.,* and *Coy R. Johnson,* Assistant Attorneys General, and *Gerald H. Cohen* and *Alexander Cocalis,* Deputy Assistant Attorneys General, for applicant. Brief in response filed by *Charles Morgan, Jr.,* for Morris et al., and brief in opposition filed by *Emmet J. Bondurant II, Francis Shackelford* and *Randolph W. Thrower* for Justice et al.

No. 394, Misc. BANDY *v.* UNITED STATES ATTORNEY GENERAL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Rogovin, Meyer Rothwacks* and *Richard B. Buhrman* for respondent.

Probable Jurisdiction Noted.

No. 551. UNITED STATES *v.* KILGORE ET AL. Appeal from D. C. S. D. Cal. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Appellee Kilgore, *pro se*.

Certiorari Denied. (See also No. 271, Misc., *ante*, p. 114; and No. 394, Misc., *supra*.)

No. 375. LEVI *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *John Y. Brown* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *George F. Rabe*, Assistant Attorney General, for respondent. Reported below: 405 S. W. 2d 559.

No. 516. COMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *E. J. Butler* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 365 F. 2d 1.

No. 568. UTTECH, SHERIFF *v.* FOSTER. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette*, Attorney General of Wisconsin, *John J. Dillon*, Attorney General of Indiana, and *Douglas B. McFadden*, Deputy Attorney General, for petitioner. *Robert E. Cook* for respondent. Reported below: 31 Wis. 2d 664, 143 N. W. 2d 500.

No. 519. VISCARDI *v.* UNITED STATES;

No. 527. PACELLI *v.* UNITED STATES; and

No. 603. ARMONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Gilbert* for petitioner in No. 519. *E. Barrett Prettyman, Jr., Robert Kasnof* and *Albert J. Krieger* for petitioner in No. 527. *Jerome Lewis* for petitioners in No. 603. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States in all three cases. Reported below: 363 F. 2d 385.

No. 529. WELCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *V. P. Crowe* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Meyer Rothwacks* and *Richard B. Buhrman* for the United States. Reported below: 371 F. 2d 287.

No. 530. LOREN SPECIALTY MFG. CO., INC. *v.* CLARK MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. *Clarence F. Martin* for petitioner. *Thomas V. Koykka* and *H. Blair White* for respondents. Reported below: 360 F. 2d 913.

No. 570. COHEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Richard B. Buhrman* for the United States. Reported below: 363 F. 2d 321.

No. 578. AIRCRAFT SPECIALTIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Harry H. Meisner* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 360 F. 2d 600.

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No. 576. TROIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 365 F. 2d 416.

No. 580. POLY INDUSTRIES, INC. *v.* MOZLEY ET AL. C. A. 9th Cir. Certiorari denied. *George M. Treister* for petitioner. Reported below: 362 F. 2d 453.

No. 582. WEINER *v.* FULTON COUNTY ET AL. Ct. App. Ga. Certiorari denied. *Beryl H. Weiner*, petitioner, *pro se*. *John Tye Ferguson* for respondents. Reported below: 113 Ga. App. 343, 148 S. E. 2d 143.

No. 583. EWAYS ET UX. *v.* BOARD OF ROAD SUPERVISORS OF EXETER TOWNSHIP ET AL. Sup. Ct. Pa. Certiorari denied. *J. Pennington Straus* for petitioners. *Samuel B. Russell* and *Robert Moore* for respondents. Reported below: 422 Pa. 169, 220 A. 2d 840.

No. 584. UNITED STATES FIDELITY & GUARANTY CO. *v.* NATIONAL SCREEN SERVICE CORP. C. A. 2d Cir. Certiorari denied. *James P. Shannon* for petitioner. *Louis Nizer* for respondent. Reported below: 364 F. 2d 275.

No. 586. WILLIAMS *v.* HOT SHOPPES, INC. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *John J. Carmody* and *Charles J. Steele* for respondent.

No. 587. BECK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Hal S. Ives* for petitioner.

No. 596. FERRON ET AL. *v.* HORNER ET AL. C. A. 9th Cir. Certiorari denied. *Martin J. Jarvis* for petitioners Ferron et al. Reported below: 362 F. 2d 224.

No. 588. First Hardin National Bank et al. *v.* Fort Knox National Bank et al. C. A. 6th Cir. Certiorari denied. *Edgar A. Zingman* for petitioners. *Robert E. Hatton* for Fort Knox National Bank, and *Solicitor General Marshall, Acting Assistant Attorney General Doolittle, David L. Rose* and *Jack H. Weiner* for the Comptroller of the Currency, respondents. Reported below: 361 F. 2d 276.

No. 589. Evans *v.* Newport News Shipbuilding & Dry Dock Co. C. A. 4th Cir. Certiorari denied. *James R. Kelley* for petitioner. *Phillips M. Dowding* for respondent. Reported below: 361 F. 2d 364.

No. 595. Pharr, dba Madisonville Cab Co. *v.* Bureau of Unemployment Compensation of Ohio. Sup. Ct. Ohio. Certiorari denied. *Harry A. Abrams* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *Bernard L. Heffernan,* Assistant Attorney General, for respondent.

No. 597. Cohen *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. *Charles J. Kersten* for petitioner. *Bronson C. La Follette,* Attorney General of Wisconsin, for respondent. Reported below: 31 Wis. 2d 97, 142 N. W. 2d 161.

No. 598. Vance *v.* State Board of Hairdressers & Cosmetologists. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. *Dan M. Fergus* for petitioner. Reported below: 400 S. W. 2d 954.

No. 208, Misc. Coles *v.* Kentucky. Ct. App. Ky. Certiorari denied. Petitioner *pro se. Robert Matthews,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent. Reported below: 401 S. W. 2d 229.

No. 562. BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY ET AL. *v.* GRIFFIN ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *J. Segar Gravatt* and *Wm. F. Watkins, Jr.*, for petitioners. Reported below: 363 F. 2d 206.

No. 572. SINFIELD *v.* DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA, ET AL. Sup. Ct. Mont. Certiorari denied. Motion of Montana Power Co. to be added as a party respondent granted. Certiorari denied. *Edward T. Dussault* for petitioner. *Francis M. Shea* and *William H. Dempsey, Jr.*, for respondent Montana Power Co.

No. 573. PEYTON, PENITENTIARY SUPERINTENDENT *v.* TIMMONS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Robert Y. Button*, Attorney General of Virginia, and *Reno S. Harp III*, Assistant Attorney General, for petitioner. *Daniel Hartnett* for respondent. Reported below: 360 F. 2d 327.

No. 577. HACKIN *v.* LOCKWOOD ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 361 F. 2d 499.

No. 579. UNITED NUCLEAR CORP. *v.* MOKI OIL & RARE METALS CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Lawrence R. Taylor* for petitioner. *Hubert D. Johnson* for respondent. Reported below: 364 F. 2d 568.

No. 300, Misc. WING *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *Norman Heine* for respondent.

No. 225, Misc. MARTIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Joseph Earl Jackson* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Gilbert J. Pena*, Assistant Attorneys General, for respondent. Reported below: 400 S. W. 2d 919.

No. 282, Misc. HOLMAN *v.* EKLUND. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Anthony M. Summers*, Deputy Attorney General, for respondent. Reported below: 354 F. 2d 1006.

No. 367, Misc. BOWE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 360 F. 2d 1.

No. 376, Misc. HOLGUIN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Gloria F. DeHart*, Deputy Attorney General, for respondent.

No. 484, Misc. GILMORE *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for respondent. Reported below: 239 Cal. App. 2d 125, 48 Cal. Rptr. 449.

No. 439, Misc. GEMMEL *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Curtis G. Beck,* Assistant Attorney General, for respondent. Reported below: 358 F. 2d 338.

No. 488, Misc. PUTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States. Reported below: 363 F. 2d 369.

No. 497, Misc. SPRENZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 526, Misc. TAYLOR *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent. Reported below: 239 Cal. App. 2d 367, 48 Cal. Rptr. 644.

No. 539, Misc. ZUNIGA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 540, Misc. WILSON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se.* *Raymond R. Trombadore,* Deputy Attorney General of New Jersey, for respondent.

No. 612, Misc. GREGORY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 210.

No. 543, Misc. McCUTCHEON *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener*, Assistant Attorneys General, for respondent.

No. 580, Misc. NIXON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 738, Misc. BOWEN *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 754, Misc. MONTGOMERY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied. Reported below: 422 Pa. 180, 220 A. 2d 859.

No. 755, Misc. BLANKINSHIP *v.* WALLACE, GOVERNOR OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 760, Misc. THOMAS *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 761, Misc. MAYBEE *v.* WEAVER, JUDGE. C. A. 3d Cir. Certiorari denied.

No. 762, Misc. WALKER *v.* PAGE, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 174, Misc. MORFORD *v.* FOGLIANI, WARDEN. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin Edward Schaengold* for petitioner. *Harvey Dickerson*, Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 82 Nev. 79, 411 P. 2d 122.

Rehearing Denied.

No. 1637, Misc. October Term, 1965. GUNSTON *v.* UNITED STATES, 384 U. S. 993;

No. 28, Original. DELAWARE ET AL. *v.* NEW YORK ET AL., *ante*, p. 895;

No. 108. MONASTERSKY *v.* UNITED STATES, *ante*, p. 815;

No. 117. CENTRAL LOUISIANA ELECTRIC CO., INC., ET AL. *v.* RURAL ELECTRIFICATION ADMINISTRATION ET AL., *ante*, p. 815;

No. 119. MARSHALL *v.* UNITED STATES, *ante*, p. 815;

No. 124. SANDOVAL ET UX. *v.* RATTIKIN, TRUSTEE, *ante*, p. 901;

No. 129. BENTVENA ET AL. *v.* UNITED STATES, *ante*, p. 815;

No. 217. TIETZ ET AL. *v.* MARIENTHAL ET AL., *ante*, p. 8;

No. 261. RUSKIN *v.* UNITED STATES, *ante*, p. 828;

No. 276. MAXFIELD ET AL. *v.* UNITED STATES, *ante*, p. 830;

No. 282. REED *v.* ILLINOIS, *ante*, p. 10;

No. 286. ALABAMA-TENNESSEE NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL., *ante*, p. 847;

No. 316. CAPELOUTO *v.* ORKIN EXTERMINATING CO. OF FLORIDA, INC., *ante*, p. 11;

No. 340. FERNICOLA *v.* UNITED STATES, *ante*, p. 836;

No. 67, Misc. ZUCKER *v.* CALIFORNIA ET AL., *ante*, p. 855;

No. 134, Misc. CROSS *v.* BRUNING, COUNTY CLERK OF SAN MATEO COUNTY, ET AL., *ante*, p. 14;

No. 226, Misc. BOGART ET UX. *v.* CALIFORNIA ET AL., *ante*, p. 888; and

No. 298, Misc. WHITTLE, ADMINISTRATOR *v.* TAWES, GOVERNOR OF MARYLAND, *ante*, p. 806. Petitions for rehearing denied.

No. 333, Misc. HARRIS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, *ante*, p. 875;

No. 404, Misc. GLASER *v.* CALIFORNIA, *ante*, p. 880;

No. 412, Misc. DAUGHTRY *v.* UNITED STATES, *ante*, p. 881;

No. 451, Misc. SESLER *v.* FLORIDA, *ante*, p. 805; and

No. 496, Misc. WEISS *v.* MORGENTHAU, U. S. ATTORNEY, *ante*, p. 885. Petitions for rehearing denied.

No. 121, Misc. MINCHELLA *v.* ESTATE OF SKILLMAN, JUDGE, ET AL., *ante*, p. 861. Motion for leave to file petition for rehearing denied.

DECEMBER 5, 1966.

Miscellaneous Orders.

No. 116. IN RE GAULT ET AL. Appeal from Sup. Ct. Ariz. (Probable jurisdiction noted, 384 U. S. 997.) Motion of Kansas Association of Probate and Juvenile Judges for leave to join the appellee's brief and the *amicus curiae* brief of Ohio Association of Juvenile Court Judges granted. *Glenn D. Cogswell* on the motion.

No. 504. SCHIPANI *v.* UNITED STATES, *ante*, p. 934. Time for filing petition for rehearing extended to and including Thursday, December 8.

No. 757, Misc. KELLY, AKA SHANNON *v.* BAIRD, SHERIFF, ET AL.;

No. 899, Misc. OYLER *v.* ATTORNEY GENERAL OF THE UNITED STATES;

No. 900, Misc. DYER *v.* WILSON, WARDEN;

No. 921, Misc. BENNETT *v.* PATE, WARDEN; and

No. 925, Misc. TODD *v.* VISENTINE ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 430. SAILORS ET AL. *v.* BOARD OF EDUCATION OF COUNTY OF KENT ET AL. Appeal from D. C. W. D. Mich. Probable jurisdiction noted. *Wendell A. Miles* and *Roger D. Anderson* for appellants. *Robert A. Derengoski*, Solicitor General of Michigan, *Eugene Krasicky*, Assistant Attorney General, and *Paul O. Strawhecker* for appellees. Reported below: 254 F. Supp. 17.

No. 491. BOARD OF SUPERVISORS OF SUFFOLK COUNTY ET AL. *v.* BIANCHI ET AL. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Case is set for oral argument immediately following No. 624. *Stanley S. Corwin*, *Reginald C. Smith*, *Pierre G. Lundberg* and *Howard M. Finkelstein* for appellants. *Richard C. Cahn* for appellees. Reported below: 256 F. Supp. 617.

No. 624. MOODY ET AL. *v.* FLOWERS ET AL. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. Case is set for oral argument immediately following No. 430. *Charles S. Rhyne* and *Brice W. Rhyne* for appellants. *Richmond M. Flowers*, Attorney General of Alabama, *pro se*, and *Gordon Madison*, Assistant Attorney General, for Flowers, and *Truman Hobbs* for Sellers et al., appellees. Reported below: 256 F. Supp. 195.

Certiorari Granted.

No. 240. SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *John H. Weir* and *Curtiss K. Thompson* for petitioner. *Acting Solicitor General Spritzer*, *Acting Assistant Attorney General Pugh*, *Jack S. Levin*, *Robert N. Anderson* and *Benjamin M. Parker* for the United States. Reported below: 351 F. 2d 489.

No. 483. REITMAN ET AL. *v.* MULKEY ET AL. Sup. Ct. Cal. Certiorari granted. *William French Smith* for petitioners. *Herman F. Selvin, A. L. Wirin, Fred Okrand, Joseph A. Ball* and *Nathaniel S. Colley* for respondents. Reported below: 64 Cal. 2d 529, 877, 413 P. 2d 825, 847.

No. 575. JACKSON *v.* LYKES BROS. STEAMSHIP CO., INC. Sup. Ct. La. Certiorari granted. *Charles R. Maloney* for petitioner. *Benjamin W. Yancey* and *William E. Wright* for respondent. Reported below: 249 La. 460, 187 So. 2d 441.

No. 637. NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST CO., EXECUTOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Milton I. Baldinger* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Pugh, Jack S. Levin, Robert N. Anderson* and *Morton K. Rothschild* for the United States. Reported below: 363 F. 2d 476.

No. 712. THORPE *v.* HOUSING AUTHORITY OF THE CITY OF DURHAM. Sup. Ct. N. C. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston* and *Michael Meltsner* for petitioner. *Daniel K. Edwards* for respondent. Reported below: 267 N. C. 431, 148 S. E. 2d 290.

No. 615. BERGER *v.* NEW YORK. Ct. App. N. Y. Petition for writ of certiorari granted, limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Assuming the basic Federal Fourth and Fifth Amendment constitutionality of New York State's permissive eavesdrop legislation which allows electronic room eavesdropping or 'bugging' by *ex parte* Court order (N. Y. Code Crim. Proc. § 813–a), were the *ex parte*

Court orders for the room eavesdrops in this particular case, without which this prosecution stipulatedly could not have been instituted or maintained, nevertheless invalid under the Fourth Amendment because not based upon an adequate showing of probable cause?

"2. Is the New York *ex parte* permissive eavesdrop legislation (N. Y. Code Crim. Proc. § 813–a) unconstitutional under the Federal Fourth, Fifth and Fourteenth Amendments as setting up a system which intrinsically involves trespassory intrusion into private premises, 'general' searches for 'mere evidence' and invasion of the privilege against self incrimination; and were the particular room eavesdrops here involved unconstitutional on those grounds?"

Joseph E. Brill for petitioner. *Frank S. Hogan* for respondent. *Victor Rabinowitz, Leonard B. Boudin, Samuel A. Neuburger* and *Raymond W. Bergan* for Habel et al., as *amici curiae,* in support of the petition. Reported below: 18 N. Y. 2d 638, 219 N. E. 2d 295.

No. 673. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF BOSCH. C. A. 2d Cir. Certiorari granted. Case is set for oral argument immediately following No. 240. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Pugh, Jack S. Levin, Robert N. Anderson* and *Benjamin M. Parker* for petitioner. *John W. Burke, Jr.,* for respondent. Reported below: 363 F. 2d 1009.

No. 280, Misc. SPECHT *v.* PATTERSON, WARDEN, ET AL. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Hugh A. Burns* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, and *John P. Moore,* Assistant Attorney General, for respondents. Reported below: 357 F. 2d 325.

Certiorari Denied. (See also No. 613, *ante*, p. 204.)

No. 546. SHOTT *v.* CONROY, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *James G. Andrews, Jr.*, for petitioner. Reported below: 363 F. 2d 90.

No. 547. O'DONNELL *v.* SULLIVAN, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL. C. A. 1st Cir. Certiorari denied. *Lawrence F. O'Donnell*, petitioner, *pro se*. *Solicitor General Marshall, Acting Assistant Attorney General Pugh, Richard B. Buhrman* and *John M. Brant* for respondents. Reported below: 364 F. 2d 43.

No. 548. MCGARRY ET AL. *v.* RILEY, SPECIAL AGENT, INTERNAL REVENUE SERVICE. C. A. 1st Cir. Certiorari denied. *Lawrence F. O'Donnell, pro se*, and for other petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Richard B. Buhrman* and *John M. Brant* for respondent. Reported below: 363 F. 2d 421.

No. 599. LEA COUNTY ELECTRIC COOPERATIVE, INC., ET AL. *v.* NEW MEXICO ELECTRIC SERVICE CO. ET AL. Sup. Ct. N. M. Certiorari denied. *William M. Siegenthaler* for petitioners. Reported below: 76 N. M. 434, 415 P. 2d 556.

No. 600. CONTINENTAL GRAIN CO. *v.* DEFFES; and

No. 602. FEDERAL BARGE LINES, INC., ET AL. *v.* DEFFES. C. A. 5th Cir. Certiorari denied. *W. Ford Reese* for petitioner in No. 600. *A. J. Waechter, Jr.*, for petitioners in No. 602. Reported below: 361 F. 2d 422.

No. 601. CONVERSE ET AL. *v.* IGEL & CO., INC. Sup. Ct. Ohio. Certiorari denied. *Richard L. Miller* for petitioners. *Walter W. Grelle, Jr.*, for respondent.

No. 604. ADDESSI ET AL. *v.* SHELL OIL CO. C. A. 1st Cir. Certiorari denied. *Adolph N. Anderson, Jr.*, for petitioners. *Matthew W. Goring* and *George M. Vetter, Jr.*, for respondent. Reported below: 363 F. 2d 101.

No. 607. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF ROCHESTER *v.* MCNELLIS, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. *Carl Angeloff* for petitioner. *Laurence Sovik* for respondent McNellis. Reported below: 364 F. 2d 251.

No. 617. HORVATH *v.* CITY OF MILWAUKEE. Sup. Ct. Wis. Certiorari denied. Petitioner *pro se*. *Patrick J. Madden* for respondent.

No. 620. ACRON INVESTMENTS, INC., ET AL. *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP. C. A. 9th Cir. Certiorari denied. *Joseph A. Ball* for petitioners. *Solicitor General Marshall* for respondent. Reported below: 363 F. 2d 236.

No. 622. SOAPE ET UX. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. Certiorari denied. *Edward B. Dufreche* for petitioners. Reported below: 358 F. 2d 312.

No. 623. SCOVILL MANUFACTURING CO. *v.* GOLDBLATT BROTHERS, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Bertha L. MacGregor* for petitioner. *Thomas F. McWilliams* for respondents. Reported below: 362 F. 2d 777.

No. 627. A. W. FENTON CO., INC. *v.* UNITED STATES. C. C. P. A. Certiorari denied. *Allerton DeC. Tompkins* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 53 C. C. P. A. (Cust.) 98.

No. 628. GOLDBERG *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Malcolm W. Berkowitz* for petitioner. *Donn I. Cohen* for respondent.

No. 629. ROTWEIN *v.* KOHLMEYER & Co. Sup. Ct. Miss. Certiorari denied. *Garner W. Green* for petitioner. Reported below: 186 So. 2d 768.

No. 631. DIRECTORS GUILD OF AMERICA, INC. *v.* HURWITZ ET AL. C. A. 2d Cir. Certiorari denied. *Louis Nizer* for petitioner. Reported below: 364 F. 2d 67.

No. 632. FUKAYA TRADING CO., S. A. *v.* EASTERN MARINE CORP., OWNER OF THE EASTERN ARGO. C. A. 5th Cir. Certiorari denied. *Moise S. Steeg, Jr.*, and *Donald A. Meyer* for petitioner. *Brunswick G. Deutsch* for respondent. Reported below: 364 F. 2d 80.

No. 635. PUBLISHERS' ASSOCIATION OF NEW YORK CITY ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *John R. Schoemer, Jr.*, for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondents. *Robert E. McKean* for Detroit Newspaper Publishers Association, as *amicus curiae*, in support of the petition. Reported below: 364 F. 2d 293.

No. 652. UNITED STATES FOR THE USE OF TANOS *v.* ST. PAUL MERCURY INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Helen Tanos Hope* for petitioner. *Goble D. Dean* for respondent. Reported below: 361 F. 2d 838.

No. 655. CHRYSLER MOTORS CORP. ET AL. *v.* BUONO SALES, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Frank C. O'Brien* for petitioners. *Samuel Carotenuto* for respondents. Reported below: 363 F. 2d 43.

No. 643. INTERNATIONAL ALLIANCE OF THEATRICAL STAGEHAND EMPLOYEES & MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 642 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Milton T. Lasher* for petitioner. *Solicitor General Marshall* and *Arnold Ordman* for respondent. Reported below: 361 F. 2d 826.

No. 646. INDIANA & MICHIGAN ELECTRIC CO. *v.* FEDERAL POWER COMMISSION. C. A. 7th Cir. Certiorari denied. *Rolon W. Reed* and *Anthony L. Fletcher* for petitioner. *Solicitor General Marshall, Richard A. Solomon, Howard E. Wahrenbrock, Drexel D. Journey* and *Israel Convisser* for respondent. Reported below: 365 F. 2d 180.

No. 661. URBAN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *Reid B. Barnes* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Maurice F. Bishop,* Special Assistant Attorney General, for respondent. Reported below: 279 Ala. 8, 180 So. 2d 910.

No. 663. WOODS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Hubert I. Teitelbaum* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 364 F. 2d 481.

No. 664. INDIANA LUMBERMENS MUTUAL INSURANCE CO. *v.* SHORTER ET AL. C. A. 6th Cir. Certiorari denied. *Herbert W. Hirsh, Norman A. Miller* and *John W. Morrison* for petitioner. *John A. Spain* for respondent Losantiville Building & Savings Co., and *Roy W. Short* for respondent Security Insurance Co. Reported below: 361 F. 2d 969.

No. 662. AERO CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *John E. Branch* and *James P. Swann* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 124 U. S. App. D. C. 215, 363 F. 2d 702.

No. 665. KLEIN *v.* KLEIN. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Solomon A. Klein*, respondent, *pro se*. Reported below: 18 N. Y. 2d 598, 219 N. E. 2d 194.

No. 667. SEAROAD SHIPPING CO. ET AL. *v.* E. I. DUPONT DE NEMOURS & CO., INC. C. A. 5th Cir. Certiorari denied. *W. F. Parker* for petitioners. *Richard F. Ralph* for respondent. Reported below: 361 F. 2d 833.

No. 670. ELLENBURG ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Wesley R. Asinof* for petitioners. *Lewis R. Slaton, J. Walter LeCraw* and *J. Robert Sparks* for respondent. Reported below: 113 Ga. App. 585, 149 S. E. 2d 173.

No. 676. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *W. P. Boone Dougherty* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 366 F. 2d 167.

No. 678. HERSCHEL *v.* WILSON. C. A. 7th Cir. Certiorari denied. *John M. Bowlus* for petitioner. *Marvin E. Aspen* for respondent. Reported below: 365 F. 2d 17.

No. 683. NEALON *v.* UNITED STATES. Ct. Cl. Certiorari denied. *John J. Nealon*, petitioner, *pro se*. *Solicitor General Marshall* for the United States.

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No. 694. DESMEDT, PRESIDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *Elmer C. Maddy* and *Ronald A. Capone* for petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders, David L. Rose, Jack H. Weiner* and *Robert N. Katz* for the .Federal Maritime Commission, and *H. Thomas Austern* and *William H. Allen* for Ludlow Corp., respondents. Reported below: 366 F. 2d 464.

No. 695. HENSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Richard E. Vimont* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 365 F. 2d 282.

No. 696. RILEY, LAKE COUNTY ENGINEER *v.* BINGHAM ET AL. Sup. Ct. Ohio. Certiorari denied. *Fred V. Skok* and *Alan D. Wright* for petitioner. Reported below: 6 Ohio St. 2d 263, 217 N. E. 2d 874.

No. 697. BOTTONE *v.* UNITED STATES;

No. 698. SALB *v.* UNITED STATES; and

No. 699. SHARFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur Karger* and *Alfred Donati, Jr.*, for petitioner in No. 697. *Moses Polakoff* for petitioner in No. 698. *Sheldon Lowe* for petitioner in No. 699. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States in all three cases. Reported below: 365 F. 2d 389.

No. 705. J. C. PENNEY CO. *v.* MARSTON. C. A. 4th Cir. Certiorari denied. *W. Brown Morton, Jr.*, and *John T. Roberts* for petitioner. *J. Hanson Boyden* and *Herndon P. Jeffreys, Jr.*, for respondent. Reported below: 353 F. 2d 976.

No. 708. SPINDLER REALTY CORP. *v.* MONNING, GENERAL MANAGER & SUPERINTENDENT OF BUILDING & SAFETY OF LOS ANGELES, ET AL. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Barry Brannen* for petitioner. *Roger Arnebergh* and *Bourke Jones* for respondents. Reported below: 243 Cal. App. 2d 255, 53 Cal. Rptr. 7.

No. 502. SITTON ET UX. *v.* AMERICAN TITLE CO. OF DALLAS ET AL. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Motion for joint consideration with Nos. 48 and 388 denied. Certiorari denied. *Fred S. Abney* for petitioners. *June R. Welch* for respondents. Reported below: 396 S. W. 2d 899.

No. 571. VON CLEMM ET AL. *v.* SMITH, TREASURER OF THE UNITED STATES, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *John A. Wilson, Robert L. Clare, Jr.,* and *B. G. Andrews* for petitioners. *Solicitor General Marshall* for respondents. Reported below: 363 F. 2d 19.

No. 606. PATTERSON, WARDEN *v.* CRUZ. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *George E. DeRoos,* Assistant Attorney General, for petitioner. Respondent *pro se.* Reported below: 363 F. 2d 879.

No. 669. ASSOCIATION OF INDUSTRIAL ELECTRICIANS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Motion to file petition for writ of certiorari *nunc pro tunc* denied. Certiorari denied. *Alexander H. Schullman* for petitioner. *Solicitor General Marshall* and *Arnold Ordman* for respondent.

No. 614. COHEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied for want of a final judgment. *Eugene Gold* for petitioner. *Aaron E. Koota* for respondent. Reported below: 18 N. Y. 2d 650, 219 N. E. 2d 427.

No. 621. FANALE *v.* ANDERSON ET AL. Ct. App. N. Y. Motion to dispense with printing petition for certiorari granted. Certiorari denied.

No. 625. IN RE MALMSTEDT. Ct. App. Md. Motion to seal the records and preserve anonymity granted. Motion of petitioner to strike portions of reply to answer to motion to seal the records and preserve anonymity denied. Certiorari denied. *Joseph H. Sharlitt* for petitioner. *H. Emslie Parks* and *Samuel S. D. Marsh* in opposition. Reported below: 243 Md. 92, 220 A. 2d 147.

No. 626. WALKER DISTRIBUTING CO. ET AL. *v.* LUCKY LAGER BREWING CO. C. A. 9th Cir. Certiorari denied for reason that the petition was not timely filed. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Douglas D. Kramer* for petitioners. *Owen Jameson* for respondent. Reported below: 362 F. 2d 1008.

No. 170, Misc. HARDWICK *v.* FIELD, MENS COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Howard J. Bechefsky*, Deputy Attorney General, for respondent.

No. 284, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 361 F. 2d 447.

No. 426, Misc. SCHULTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 360 F. 2d 616.

No. 551, Misc. CHICK *v.* KENTUCKY ET AL. Ct. App. Ky. Certiorari denied. Petitioner *pro se*. *Robert Matthews*, Attorney General of Kentucky, and *Darryl T. Owens*, Assistant Attorney General, for respondents. Reported below: 405 S. W. 2d 14.

No. 561, Misc. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles Mark Demos* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 360 F. 2d 939.

No. 566, Misc. RICE *v.* LEE, CORRECTIONS COMMISSIONER, ET AL. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *Paul T. Gish, Jr.*, Assistant Attorney General, for respondents.

No. 573, Misc. COLLIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham, Earl E. Strayhorn, Charles B. Evins, Howard T. Savage* and *Sam Adam* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 362 F. 2d 135.

No. 575, Misc. ALEXANDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 362 F. 2d 379.

No. 582, Misc. WOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 361 F. 2d 802.

No. 585, Misc. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, *Jack K. Weber*, Deputy Attorney General, for respondent.

No. 620, Misc. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 363 F. 2d 551.

No. 663, Misc. GARLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome J. Londin* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 487.

No. 694, Misc. HURLEY *v.* BLACKWELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 695, Misc. WILSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 696, Misc. BOSNICH *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 273 Minn. 553, 142 N. W. 2d 63.

No. 698, Misc. GRENE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 699, Misc. GILLESPIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 716, Misc. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 364 F. 2d 486.

No. 719, Misc. CODY *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 362 F. 2d 802.

No. 723, Misc. CASIAS ET AL. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Samuel D. Menin* for petitioners. Reported below: — Colo. —, 415 P. 2d 344.

No. 732, Misc. BURRIS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 360 F. 2d 110.

No. 734, Misc. MUSGROVE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *W. Edward Morgan* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, and *Gary K. Nelson*, Assistant Attorney General, for respondent.

No. 736, Misc. KYLE *v.* CLERK, U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 752, Misc. SKRMETTI *v.* MARODIS. Sup. Ct. Miss. Certiorari denied. Reported below: 186 So. 2d 775.

No. 742, Misc. DAULBY *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 756, Misc. WHITTINGTON *v.* PRESTON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 764, Misc. RIVERS *v.* SUPREME COURT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 765, Misc. BALDWIN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 47 N. J. 379, 221 A. 2d 199.

No. 768, Misc. HERRERA ET AL. *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 364 F. 2d 798.

No. 770, Misc. CANDELARIA *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 776, Misc. BLACK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 778, Misc. MURRAY *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 783, Misc. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 240 Ark. 771, 402 S. W. 2d 412.

No. 785, Misc. REIMERS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 31 Wis. 2d 457, 143 N. W. 2d 525.

No. 794, Misc. ABDELKADER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 787, Misc. HAYES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 364 F. 2d 303.

No. 792, Misc. COOK *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 351 Mass. 231, 218 N. E. 2d 393.

No. 786, Misc. OOSTERWYK *v.* COUNTY OF MILWAUKEE ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 31 Wis. 2d 513, 143 N. W. 2d 497.

No. 803, Misc. WOLFF *v.* KROSHINSKY. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *John J. Costanzo* for respondent.

No. 805, Misc. KOEHN *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 814, Misc. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Evander Cade Smith* for petitioner.

No. 816, Misc. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. Reported below: 365 F. 2d 21.

No. 827, Misc. LOMBARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 569, Misc. GRIFFIN *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 360 F. 2d 614.

No. 759, Misc. DEJOSEPH *v.* CONNECTICUT. Sup. Ct. Conn. and/or App. Div., Cir. Ct. Conn. Certiorari denied. *William D. Graham* for petitioner. Reported below: 3 Conn. Cir. 624, 222 A. 2d 752.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting from the denial of certiorari.

This case illustrates, in even more compelling terms than *Winters* v. *Beck, ante,* p. 907, the need for this Court to make clear the meaning of *Gideon* v. *Wainwright,* 372 U. S. 335.

The petitioner was charged in a Connecticut court with criminal nonsupport, a misdemeanor under Connecticut law punishable by imprisonment of up to a year. At his arraignment he told the judge that he was indigent, and requested that counsel be appointed. The judge informed him that appointment of counsel was not possible because the charge was only a misdemeanor. At trial, the petitioner again indicated that he wanted counsel, but his request was ignored by the trial judge. He attempted to conduct his own defense, and was convicted and sentenced to six months in jail. The conviction was affirmed by the Appellate Division of the Connecticut Circuit Court. That court noted that the petitioner had failed to request findings on the issue of his indigency, as required by local practice rules, and held that without more proof of indigency he could not claim that he had been deprived of any right to appointed counsel. Clearly, constitutional claims cannot be blocked by such procedural obstacles, in a case where the defendant, appearing alone in court, saw his requests for counsel denied outright by one judge and totally ignored by another.

The petitioner's conviction in this case is squarely at odds with the decision of the Federal District Court for the District of Connecticut in *Arbo* v. *Hegstrom,*

261 F. Supp. 397. Arbo was charged in Connecticut with criminal nonsupport, the identical offense with which the petitioner here was charged and convicted. Unlike the petitioner, Arbo pleaded guilty and never requested that counsel be appointed for him. Nevertheless, the Federal District Judge held that *Gideon* guaranteed Arbo the right to appointed counsel. Arbo's conviction was set aside because he had not been told of his right to counsel, and the State has not appealed.

Arbo was set free. The petitioner, convicted of the same offense in the same State, remains in jail. When the meaning of a fundamental constitutional right depends on which court in Connecticut a person turns to for redress, I believe it is time for this Court to intervene. I would grant certiorari and set this case for argument.

No. 780, Misc. HATFIELD *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Petition for writ of certiorari and for other relief denied.

Rehearing Denied.

No. 1018, Misc. October Term, 1965. NIELSEN *v.* NEBRASKA STATE BAR ASSOCIATION, 383 U. S. 105, 954. Motion for leave to file second petition for rehearing denied.

No. 174. SULE *v.* MISSOURI PACIFIC RAILROAD CO. ET AL., *ante*, p. 819; and

No. 388. KING *v.* VICO INSURANCE CO. OF ST. LOUIS, *ante*, p. 841. Motions for joint consideration with other cases denied. Petitions for rehearing denied.

No. 127, Misc. ORTIZ *v.* UNITED STATES, *ante*, p. 861. Motion for leave to file petition for rehearing denied.

No. 123. LUCOM ET VIR. *v.* ATLANTIC NATIONAL BANK OF WEST PALM BEACH, *ante*, p. 898;

No. 243. BRENNAN *v.* SELLERS, *ante*, p. 828;

No. 437. COLORADO-UTE ELECTRIC ASSOCIATION, INC. *v.* WESTERN COLORADO POWER CO. ET AL., *ante*, p. 22;

No. 453. RUTH *v.* BLUE RIVER CONSTRUCTORS ET AL., *ante*, p. 920;

No. 593. KAHN *v.* UNITED STATES, *ante*, p. 948;

No. 594. SCHAWARTZBERG *v.* UNITED STATES, *ante*, p. 948;

No. 180, Misc. JONES *v.* UNITED STATES, *ante*, p. 936;

No. 288, Misc. BELK *v.* KENTUCKY, *ante*, p. 937;

No. 360, Misc. LITTLE *v.* UNITED STATES, *ante*, p. 878;

No. 445, Misc. DANIELS *v.* COOK BROADCASTING CO. ET AL., *ante*, p. 904;

No. 448, Misc. ANDREWS *v.* HOLMAN, WARDEN, *ante*, p. 937;

No. 466, Misc. NEWHOUSE *v.* CALIFORNIA, *ante*, p. 922;

No. 599, Misc. BEY ET AL. *v.* UNITED STATES, *ante*, p. 905;

No. 605, Misc. MACK *v.* MAXWELL, WARDEN, *ante*, p. 906;

No. 683, Misc. DARBY *v.* FLORIDA, *ante*, p. 896; and

No. 691, Misc. SAUNDERS *v.* REUSS, CLERK, ET AL., *ante*, p. 925. Petitions for rehearing denied.

DECEMBER 12, 1966.

Miscellaneous Orders.

No. 149. ADAY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Motion of Citizens for Decent Literature, Inc., for leave to file a brief, as *amicus curiae*, granted. *Charles H. Keating, Jr.*, and *James J. Clancy* on the motion.

No. 4. CASCADE NATURAL GAS CORP. *v.* EL PASO NATURAL GAS CO. ET AL.;

No. 5. CALIFORNIA *v.* EL PASO NATURAL GAS CO. ET AL.; and

No. 24. SOUTHERN CALIFORNIA EDISON CO. *v.* EL PASO NATURAL GAS CO. ET AL. Appeal from D. C. Utah. (Probable jurisdiction noted, 382 U. S. 970.) Motion of State of Oregon for leave to participate in oral argument granted and ten minutes allotted for that purpose. Counsel for appellees shall be allotted an additional ten minutes for oral argument. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Robert Y. Thornton,* Attorney General of Oregon, and *Richard W. Sabin,* Assistant Attorney General, on the motion.

No. 462. WASHINGTON PUBLIC POWER SUPPLY SYSTEM *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. (Certiorari granted, *ante,* p. 926.) Motions of Idaho Fish and Game Commission, Idaho Wildlife Federation, and Washington State Sportsmen's Council, Inc., et al. to be added as parties respondent granted. Case removed from summary calendar. *Alan G. Shepard,* Attorney General of Idaho, and *T. J. Jones III* for Idaho Fish and Game Commission. *C. Frank Reifsnyder* for Idaho Wildlife Federation. *Joseph T. Mijich* for Washington State Sportsmen's Council, Inc., et al.

No. 480. WARDEN, MARYLAND PENITENTIARY *v.* HAYDEN. C. A. 4th Cir. (Certiorari granted, *ante,* p. 926.) Motion of respondent for appointment of counsel granted. It is ordered that *Albert R. Turnbull, Esquire,* of Charlottesville, Virginia, be, and he is hereby, appointed to serve as counsel for the respondent in this case.

No. 800. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MORRIS ET AL. Appeal from D. C. N. D. Ga. Motion of *Reuben A. Garland* for leave to intervene denied. [For earlier order herein, see, *ante*, p. 955.]

No. 576, Misc. CLEMONS *v.* WILSON, WARDEN;

No. 888, Misc. KLINES *v.* SCHNECKLOTH;

No. 891, Misc. TUCKER *v.* FIELD, MENS COLONY SUPERINTENDENT; and

No. 894, Misc. WILLIAMS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 395. LOVING ET UX. *v.* VIRGINIA. Appeal from Sup. Ct. App. Va. *Bernard S. Cohen* for appellants. *Robert Y. Button*, Attorney General of Virginia, and *Kenneth C. Patty* and *R. D. McIlwaine III*, Assistant Attorneys General, for appellee. Reported below: 206 Va. 924, 147 S. E. 2d 78.

Certiorari Granted. (See No. 328, *ante*, p. 370; and No. 504, *ante*, p. 372.)

Certiorari Denied.

No. 592. BAKER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Allen M. Mesirow* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 364 F. 2d 107.

No. 651. HOWARD *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. C. A. 8th Cir. Certiorari denied. *Robert L. Carter, Barbara A. Morris* and *Frank D. Reeves* for petitioner. Reported below: 361 F. 2d 905.

No. 605. SKOURAS THEATRES CORP. ET AL. *v.* SPANOS. C. A. 2d Cir. Certiorari denied. *Milton C. Weisman* and *Harry I. Rand* for petitioners. *Leo T. Kissam, Eugene Gressman* and *Richard Gyory* for respondent. Reported below: 364 F. 2d 161.

No. 608. KOKIN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Charles J. Irwin* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 595.

No. 611. FLEISHOUR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Elmer Gertz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Sanders, Alan S. Rosenthal* and *Richard S. Salzman* for the United States. Reported below: 365 F. 2d 126.

No. 630. CHAMBERLAIN ET AL. *v.* ZINK ET AL.; and
No. 686. ZINK ET AL. *v.* PACK ET AL. C. A. 5th Cir. Certiorari denied. *Charles B. Arendall, Jr.*, for petitioners in No. 630. *Willis C. Darby, Jr.*, for petitioners in No. 686. Reported below: 362 F. 2d 723.

No. 654. RUTHERFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph A. Ball* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro* and *Charles L. Marinaccio* for the United States. Reported below: 365 F. 2d 353.

No. 710. CELOTEX CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *W. Donald McSweeney* and *Mitchell S. Rieger* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 364 F. 2d 552.

No. 674. SMYTH, CORRECTIONS DIRECTOR *v.* HOWARD. C. A. 4th Cir. Certiorari denied. *Robert Y. Button*, Attorney General of Virginia, and *Reno S. Harp III*, Assistant Attorney General, for petitioner. Reported below: 365 F. 2d 428.

No. 679. BROWN *v.* FOLLIN, AUDITOR OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. *Darwin Charles Brown*, petitioner, *pro se*.

No. 681. HAMILTON *v.* CLEVELAND BAR ASSOCIATION. Sup. Ct. Ohio. Certiorari denied. *A. L. Kearns* for petitioner. Reported below: 6 Ohio St. 2d 264, 217 N. E. 2d 863.

No. 684. REKEWEG *v.* OHIO STATE BAR ASSOCIATION. Sup. Ct. Ohio. Certiorari denied. *Bernard A. Berkman*, *Larry S. Gordon* and *Joshua J. Kancelbaum* for petitioner. *Thomas R. Spellerberg* for respondent. Reported below: 6 Ohio St. 2d 128, 216 N. E. 2d 370.

No. 700. WILLIAMS *v.* ANDERSON. C. A. 3d Cir. Certiorari denied. *Charles B. E. Freeman* for petitioner. Reported below: 362 F. 2d 1011.

No. 706. PITTSBURGH NATIONAL BANK, EXECUTOR *v.* EQUITABLE GAS CO. Sup. Ct. Pa. Certiorari denied. *Charles A. Miller* for petitioner. *William H. Eckert* and *Milton W. Lamproplos* for respondent. Reported below: 421 Pa. 468, 220 A. 2d 12.

No. 707. RAMIREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Marshall*, *Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 813.

No. 713. STRAUSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Arthur B. Cunningham* and *Philip T. Weinstein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 363 F. 2d 366.

No. 187. DESTEFANO *v.* ILLINOIS. Sup. Ct. Ill. Motion for leave to amend petition granted. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Julius Lucius Echeles* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for respondent.

No. 539. SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. *v.* KELBERINE ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition. *John J. Wilson* and *Frank H. Strickler* for petitioner. Reported below: 124 U. S. App. D. C. 257, 363 F. 2d 989.

No. 549. KELBERINE ET AL. *v.* SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition. *Harold E. Stassen* and *Roger A. Johnsen* for petitioners. *John J. Wilson* and *Frank H. Strickler* for Societe Internationale Pour Des Participations Industrielles et Commerciales, S. A., and *Solicitor General Marshall, Assistant Attorney General Sanders, Morton Hollander* and *Richard S. Salzman* for Clark et al., respondents. Reported below: 124 U. S. App. D. C. 257, 363 F. 2d 989.

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No. 543. BLACK ET AL. *v.* STRAND ET AL.;

No. 544. BLACK ET AL. *v.* BRANDO, ADMINISTRATRIX, ET AL.;

No. 545. BLACK ET AL. *v.* DENVER UNITED STATES NATIONAL BANK; and

No. 653. BRANDO, ADMINISTRATRIX, ET AL. *v.* BLACK ET AL. C. A. 8th Cir. Motion for issuance of a peremptory writ of certiorari in No. 543 denied. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion or of these petitions. *Leslie R. Bishop* for petitioners in Nos. 543, 544 and 545 and for respondents in No. 653. *Allen E. Susman* for petitioners in No. 653 and for respondents in No. 544. Reported below: No. 543, 362 F. 2d 8; Nos. 544 and 653, 362 F. 2d 19; and No. 545, 362 F. 2d 38.

No. 659. WISCONSIN *v.* MILWAUKEE BRAVES, INC., ET AL. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Bronson C. La Follette*, Attorney General of Wisconsin, *Arlen Christenson*, Deputy Attorney General, *George F. Sieker*, Assistant Attorney General, *Robert P. Russell, Steven E. Keane, Lloyd N. Cutler, Louis F. Oberdorfer, Max O. Truitt, Jr.*, and *Timothy B. Dyk* for petitioner. *Ray T. McCann* and *Louis F. Carroll* for respondents. *William G. Clark*, Attorney General, for the State of Illinois, as *amicus curiae*, in support of the petition. Reported below: 31 Wis. 2d 699, 144 N. W. 2d 1.

No. 709. MCCULLOUGH TOOL CO. ET AL. *v.* WELL SURVEYS, INC., ET AL. C. A. 10th Cir. Motion to use record in No. 366, October Term, 1965, granted. Certiorari denied. *R. Welton Whann* for petitioners. *Rufus S. Day, Jr.*, and *Robert W. Fulwider* for respondents.

No. 716. CALZAVARA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Marshall* for the United States.

No. 717. ALUMINUM CO. OF AMERICA ET AL. *v.* WOODS EXPLORATION & PRODUCING CO., INC., ET AL. Sup. Ct. Tex. Certiorari denied. *Leroy Jeffers* for petitioners. *Price Daniel* and *Levert J. Able* for respondents Woods Exploration & Producing Co., Inc., et al. Reported below: 405 S. W. 2d 313.

No. 672. MAROSCIA *v.* DISPATCH PRINTING CO. ET AL. C. A. 2d Cir. Motion to dispense with printing the petition granted. Petition for a writ of certiorari and for other relief denied.

No. 690. MARTIN *v.* PHILLIPS PETROLEUM CO. ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE would grant the petition and reverse the judgments of the lower courts. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, and *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656. *A. A. White* and *Ben H. Schleider, Jr.*, for petitioner. *Leroy Jeffers* for respondent Phillips Petroleum Co., and *John W. Barnum* for respondents Chemical Bank New York Trust Co. et al. Reported below: 365 F. 2d 629.

No. 217, Misc. MANGEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 482, Misc. BOOZE *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Albert J. Ahern, Jr.*, and *Josiah Lyman* for petitioner. *William J. Hassan* for respondent.

No. 268, Misc. AUSTIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent. Reported below: 358 F. 2d 736.

No. 320, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 440, Misc. THOMAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *Stanley D. Kupiszewski, Jr.,* Assistant Attorney General, for respondent.

No. 483, Misc. PELLETIER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Thomas J. Greer, Jr.,* for petitioner. *Solicitor General Marshall* for the United States.

No. 507, Misc. JONES *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, for respondent.

No. 563, Misc. BRENT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Petitioner *pro se.* *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, *Sargent Pitcher, Jr.,* and *Ralph L. Roy* for respondent.

No. 632, Misc. LAMACCHIO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 362 F. 2d 383.

No. 586, Misc. GRANGER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Wallace E. Allbritton*, Assistant Attorney General, for respondent.

No. 568, Misc. RAMSEUR *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. *Charles Morgan, Jr.*, for petitioner. *Solicitor General Marshall* for respondent.

No. 608, Misc. VINCENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 361 F. 2d 474.

No. 624, Misc. PAYTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Monroe Goldwater, Grace L. Brodsky* and *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 363 F. 2d 996.

No. 639, Misc. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for respondent.

No. 650, Misc. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 758, Misc. RODGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 358.

No. 652, Misc. EDWARDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 661, Misc. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 363 F. 2d 871.

No. 679, Misc. PYLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *William J. Garber* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 124 U. S. App. D. C. 129, 362 F. 2d 959.

No. 690, Misc. METCALFE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 784, Misc. TODD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 362 F. 2d 531.

No. 796, Misc. HARDKE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 822, Misc. HURLEY *v.* ALEXANDER ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 797, Misc. LEE *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 2d 824.

No. 806, Misc. MATHIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 809, Misc. D'ERCOLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 361 F. 2d 211.

No. 841, Misc. WARRINER *v.* FERRARO ET AL. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Joseph Pardo, pro se,* and for respondents Goldman et al.

Rehearing Granted. (See No. 504, *ante,* p. 372.)

Rehearing Denied.

No. 366, October Term, 1965. MCCULLOUGH TOOL CO. ET AL. *v.* WELL SURVEYS, INC., ET AL., 383 U. S. 933, 384 U. S. 947. Motion for leave to file second petition for rehearing denied.

No. 319. PITTSBURGH TOWING CO. *v.* MISSISSIPPI VALLEY BARGE LINE CO. ET AL., *ante,* p. 32;

No. 671, Misc. SPRY *v.* OBERHAUSER ET AL., *ante,* p. 940; and

No. 813, Misc. FURTAK *v.* MANCUSI, WARDEN, *ante,* p. 945. Petitions for rehearing denied.

No. 96, Misc. MCCLELLAN *v.* HUSTON, *ante,* p. 13. Motion for leave to file petition for rehearing denied.

DECEMBER 16, 1966.

Dismissal Under Rule 60.

No. 859, Misc. CALLAS *v.* WASHINGTON. Sup. Ct. Wash. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

DECEMBER 29, 1966.

Dismissal Under Rule 60.

No. 813. CITY OF SCRANTON ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. N. Y. Dismissed as to appellant Township of Weehawken pursuant to Rule 60 of the Rules of this Court. *Gordon P. MacDougall* for appellant. Reported below: 259 F. Supp. 964.

JANUARY 9, 1967.

Miscellaneous Orders.

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.;
No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL.; and
No. 11, Orig. ILLINOIS *v.* MICHIGAN ET AL.

Report of the Special Master received and ordered filed. The following schedule for filing of exceptions and briefs adopted:

1. Exceptions by all parties to report of the Special Master, to be filed on or before March 6, 1967.

2. Opening briefs by all parties in support of their exceptions to be filed on or before June 5, 1967.

3. Briefs by all parties in answer to opening briefs to be filed on or before September 5, 1967.

4. Reply briefs by all parties to be filed by November 6, 1967.

[For earlier actions, see 360 U. S. 712; 361 U. S. 956; 362 U. S. 908, 957, 958, 972.]

No. 209. RAILROAD TRANSFER SERVICE, INC. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. (Certiorari granted, *ante*, p. 810.) Motion of Chicago Terminal Railroads for leave to file brief, as *amicus curiae*, granted. *Joseph H. Hays, James W. Nisbet* and *Ed White* on the motion.

No. 831. SPECHT *v.* PATTERSON, WARDEN, ET AL. (Certiorari granted, *ante*, p. 968.) C. A. 10th Cir. Motion of petitioner for appointment of counsel granted. It is ordered that *Michael A. Williams, Esquire*, of Denver, Colorado, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 136. SWANN ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. (*Ante*, p. 440.) Appellants' petition for stay denied. It is ordered that the judgment in this case issue forthwith. *D. P. S. Paul, P. D. Thomson, Neal Rutledge* and *Richard F. Wolfson* for Swann, and *Thomas C. Britton* and *Stuart Simon* for Supervisor of Elections of Dade County, appellants, on the petition for stay. *Earl Faircloth*, Attorney General of Florida, and *Edward D. Cowart*, Assistant Attorney General, for appellees Adams et al., in opposition to the petition.

No. 181. GROSSO *v.* UNITED STATES. C. A. 3d Cir. (Certiorari granted, *ante*, p. 810.) Motion to remove case from summary calendar denied. *Charles Alan Wright* on the motion.

No. 689, Misc. COFFEE *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Wallace E. Allbritton*, Assistant Attorney General, for respondent.

No. 779, Misc. REYES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Wallace E. Allbritton*, Assistant Attorney General, for respondent.

No. 730. ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ore. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 947, Misc. DEAN *v.* FLORIDA;
No. 980, Misc. ALEXANDER *v.* VIRGINIA;
No. 984, Misc. STACEY *v.* ILLINOIS;
No. 998, Misc. KINDERMAN *v.* TAHASH, WARDEN; and
No. 1010, Misc. JACKSON *v.* WILSON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 629, Misc. CLEMONS *v.* WILSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Louise H. Renne,* Deputy Attorney General, for respondent.

No. 777, Misc. FONTANA *v.* SCHNECKLOTH, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Roger E. Venturi,* Deputy Attorneys General, for respondents.

No. 774, Misc. WEIDEMANN *v.* CALIFORNIA ET AL.;
No. 926, Misc. RUHL ET AL. *v.* SUPREME COURT OF PENNSYLVANIA; and
No. 927, Misc. SIPULT *v.* OLIVER ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 907, Misc. SKOLNICK *v.* KNOCH, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 969, Misc. MASON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. Motion for leave to file petition for writ of injunction and for other relief denied.

No. 924, Misc. SCOTT *v.* DAWKINS, U. S. DISTRICT JUDGE; and

No. 935, Misc. HUSTON *v.* KANSAS. Motions for leave to file petitions for writs of mandamus denied.

No. 953, Misc. SMITH ET AL. *v.* STANLEY, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *James B. Flack* for petitioners. *Robert C. Londerholm,* Attorney General of Kansas, and *Kenton C. Granger,* Assistant Attorney General, for respondent.

No. 904, Misc. ORTEGA *v.* MONTANTE, JUDGE. D. C. E. D. Mich. Motion for leave to file petition for writ of certiorari denied.

Probable Jurisdiction Postponed.

No. 724. DUSCH ET AL. *v.* DAVIS ET AL. Appeal from C. A. 4th Cir. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. Case placed on summary calendar and set for argument immediately following No. 491. In addition to the merits of case, counsel directed to brief and present oral argument on question whether a three-judge court should have been convened. *Archibald G. Robertson* for appellants. *Henry E. Howell, Jr.,* for appellees. Reported below: 361 F. 2d 495.

Certiorari Granted. (See also No. 31, Misc., *ante*, p. 452.)

No. 38. MARCHETTI *v.* UNITED STATES. C. A. 2d Cir. Petition for writ of certiorari is granted limited to the following question:

Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965), overrule *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955)?

David Goldstein and *Jacob D. Zeldes* for petitioner. Reported below: 352 F. 2d 848.

No. 339. HUGHES *v.* WASHINGTON. Sup. Ct. Wash. Certiorari granted. *John Gavin* for petitioner. *John J. O'Connell*, Attorney General of Washington, and *Harold T. Hartinger* and *James C. Hanken*, Assistant Attorneys General, for respondent. Reported below: 67 Wash. 2d 799, 410 P. 2d 20.

No. 781. NATIONAL LABOR RELATIONS BOARD *v.* GREAT DANE TRAILERS, INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *O. R. T. Bowden* for respondent. Reported below: 363 F. 2d 130.

No. 794. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 10th Cir. Certiorari granted. *George L. Saunders, Jr.*, for petitioner. *Edward J. Hickey, Jr.*, and *James L. Highsaw, Jr.*, for respondents. Reported below: 367 F. 2d 137.

No. 275. WAINWRIGHT *v.* CITY OF NEW ORLEANS. Sup. Ct. La. Certiorari granted. *Melvin L. Wulf* for petitioner. *Alvin J. Liska* for respondent. Reported below: 248 La. 1097, 184 So. 2d 23.

Certiorari Denied. (See also No. 671, *ante*, p. 456; No. 704, *ante*, p. 449; No. 758, *ante*, p. 453; No. 767, Misc., *ante*, p. 451; No. 917, Misc., *ante*, p. 452; and Misc. Nos. 629, 774, 777, 926, and 927, *supra*.)

No. 464. ELDER *v.* BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Reginald G. Hearn* for petitioner. *Thomas C. Lynch*, Attorney General of California, and *Gerald F. Carreras*, Deputy Attorney General, for respondent. Reported below: 241 Cal. App. 2d 246, 50 Cal. Rptr. 304.

No. 609. BARROW, AKA BARRETT, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Morton Witkin* and *Stanford Shmukler* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 363 F. 2d 62.

No. 618. MOORE ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James H. Michael, Jr.*, and *Robert M. Musselman* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Burton Berkley* for the United States. Reported below: 360 F. 2d 353.

No. 619. ANDREADIS, AKA ANDRE, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 366 F. 2d 423.

No. 610. FIRESTONE TIRE & RUBBER CO. *v.* FEDERAL TRADE COMMISSION; and

No. 685. SHELL OIL CO. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *Thomas S. Markey* and *John F. Floberg* for petitioner in No. 610. *William Simon, John Bodner, Jr.*, and *William F. Kenney* for petitioner in No. 685. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Milton J. Grossman, James McI. Henderson* and *Alvin L. Berman* for respondent in both cases. Reported below: 360 F. 2d 470.

No. 636. EMPIRE RAYON YARN CO., INC. *v.* AMERICAN VISCOSE CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Greenwald* and *Randolph J. Seifert* for petitioner. *Sidney P. Howell, Jr.*, for American Viscose Corp., and *Nahum A. Bernstein* for Malina et al., respondents. Reported below: 354 F. 2d 182.

No. 657. PACIFIC FAR EAST LINE, INC. *v.* GOVERNMENT OF GUAM. C. A. D. C. Cir. Certiorari denied. *Mark P. Schlefer* for petitioner. *Harold W. Burnett*, Attorney General of Guam, and *Donald O. Lincoln* for respondent. Reported below: 124 U. S. App. D. C. 324, 365 F. 2d 515.

No. 666. LESTER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *J. Leonard Walker* and *Howell W. Vincent* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 363 F. 2d 68.

No. 720. BLAU *v.* LAMB ET AL. C. A. 2d Cir. Certiorari denied. *Morris J. Levy* for petitioner. *Albert R. Connelly* and *Robert Rosenman* for respondents. Reported below: 363 F. 2d 507.

No. 677. A. P. SMITH MANUFACTURING CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert P. Weil* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for the United States. Reported below: 176 Ct. Cl. 1074, 364 F. 2d 831.

No. 711. FORSTER MFG. CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 1st Cir. Certiorari denied. *Charles S. Rhyne, Brice W. Rhyne, Alfred J. Tighe, Jr., Richard A. Tilden* and *Charles H. Burton* for petitioners. *Solicitor General Marshall* and *James McI. Henderson* for respondent. Reported below: 361 F. 2d 340.

No. 718. CUDMORE *v.* RICHARDSON-MERRELL, INC. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Harvey L. Davis* for petitioner. *Donald L. Case* and *Jack Pew, Jr.*, for respondent. Reported below: 398 S. W. 2d 640.

No. 719. BRANCH ET AL. *v.* JOHNSON. C. A. 4th Cir. Certiorari denied. *Julian R. Allsbrook* and *Richard B. Allsbrook* for petitioners. *Philip J. Hirschkop, Bernard S. Cohen, William M. Kunstler* and *Arthur Kinoy* for respondent. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for the State of North Carolina, as *amicus curiae,* in support of the petition. Reported below: 364 F. 2d 177.

No. 721. PEACOCK RECORDS, INC., ET AL. *v.* CHECKER RECORDS, INC., ET AL. C. A. 7th Cir. Certiorari denied. *William R. Ming, Jr.*, for petitioners. *Anthony Bradley Eben* for respondents. Reported below: 365 F. 2d 145.

No. 722. ARNONE ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Eugene Feldman* for petitioners. *Nat H. Hentel* for respondent.

No. 723. F. & D. RENTALS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *John L. Carey* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Melva M. Graney* and *Carolyn R. Just* for respondent. Reported below: 365 F. 2d 34.

No. 727. STAYNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome B. Tobias* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States.

No. 729. ROYAL NETHERLANDS STEAMSHIP CO. *v.* STRACHAN SHIPPING CO.; and

No. 741. STRACHAN SHIPPING CO. *v.* ROYAL NETHERLANDS STEAMSHIP CO. C. A. 5th Cir. Certiorari denied. *William M. Kimball* for petitioner in No. 729 and for respondent in No. 741. *E. D. Vickery* for petitioner in No. 741 and for respondent in No. 729. Reported below: 362 F. 2d 691.

No. 731. LOCAL UNION No. 542-A, -B, -C, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 360 F. 2d 111.

No. 733. PRUSA ET AL. *v.* CERMAK ET AL. Sup. Ct. Okla. Certiorari denied. *Clyde V. Collins* for petitioners. *Paul W. Cress* for respondents.

No. 737. BLOOMFIELD STEAMSHIP CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 359 F. 2d 506.

No. 728. GOLDSTEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bernard Speisman* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 364 F. 2d 734, 742, 744.

No. 739. MEISTER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Norman C. Skogstad* for petitioner. *Bronson C. La Follette*, Attorney General of Wisconsin, for respondent.

No. 740. MARINA MERCANTE NICARAGUENSE, S. A., AS OWNER OF THE EL SALVADOR *v.* MCALLISTER BROTHERS, INC., AS OWNER OF THE TUG RUSSELL NO. 18, ET AL. C. A. 2d Cir. Certiorari denied. *Victor S. Cichanowicz* for petitioner. *Christopher E. Heckman* for McAllister Brothers, Inc., *James David Auslander* for Evans, and *Frank C. Mason* and *Robert A. Lilly* for Salvesen et al., respondents. Reported below: 364 F. 2d 118.

No. 742. MONDAKOTA GAS CO. *v.* REED ET AL. C. A. 9th Cir. Certiorari denied. *Daryl E. Engebregson* for petitioner. *Cale Crowley* for respondent Reed. Reported below: 363 F. 2d 879.

No. 743. NORTON CO. ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. *John W. Malley* for petitioners. *Thomas V. Koykka, Edward A. Haight* and *Harold J. Kinney* for respondent. Reported below: 366 F. 2d 238.

No. 747. SHERIDAN CREATIONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Ralph P. Katz* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Glen M. Bendixsen* for respondent. Reported below: 357 F. 2d 245.

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No. 746. WERNER *v.* OHIO. Ct. App. Ohio, Geauga County. Certiorari denied. *Barry M. Byron* for petitioner. *William Saxbe,* Attorney General of Ohio, and *Edwin T. Hofstetter* for respondent.

No. 748. CASAVINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederic C. Ritger, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 368 F. 2d 987.

No. 749. MCINNES ET AL. *v.* PORT OF NEW YORK AUTHORITY. Ct. App. N. Y. Certiorari denied. *Stanley Geller* for petitioners. *Sidney Goldstein* for respondent. Reported below: 18 N. Y. 2d 250, 219 N. E. 2d 797.

No. 751. UNGAR *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Morton Liftin* for petitioner. *John G. Bonomi* for respondent. Reported below: 25 App. Div. 2d 322, 269 N. Y. S. 2d 163.

No. 755. BLAU *v.* PETTEYS ET AL. C. A. 8th Cir. Certiorari denied. *Morris J. Levy* for petitioner. *Martin D. Jacobs* for respondents. Reported below: 367 F. 2d 528.

No. 757. MARSHALL *v.* SAWYER, GOVERNOR OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. *William B. Beirne, A. L. Wirin* and *Fred Okrand* for petitioner. *Harvey Dickerson,* Attorney General of Nevada, and *Don W. Winne,* Deputy Attorney General, for respondents. Reported below: 365 F. 2d 105.

No. 763. UNION BARGE LINE CORP. ET AL. *v.* ALLEN. C. A. 5th Cir. Certiorari denied. *George B. Matthews* for petitioners Union Barge Line Corp. et al. *C. Paul Barker* for respondent. Reported below: 361 F. 2d 217.

No. 752. GUZIAK *v.* FEDERAL TRADE COMMISSION. C. A. 8th Cir. Certiorari denied. *Harry E. McDermott, Jr.*, for petitioner. *Solicitor General Marshall* and *James McI. Henderson* for respondent. Reported below: 361 F. 2d 700.

No. 761. LITTELL *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Herbert Pittle* for respondent. Reported below: 125 U. S. App. D. C. 89, 366 F. 2d 668.

No. 764. BURR OAKS CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Gerald J. Kahn* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 365 F. 2d 24.

No. 765. HUMBLE OIL & REFINING CO. *v.* STANDARD OIL CO. (KENTUCKY). C. A. 5th Cir. Certiorari denied. *Arthur H. Dean, David W. Peck, Roy H. Steyer* and *Edward W. Keane* for petitioner. *Francis R. Kirkham, James B. Atkin* and *Beverly W. Pattishall* for respondent. Reported below: 363 F. 2d 945.

No. 769. CHERVY ET UX. *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., LTD. C. A. 9th Cir. Certiorari denied. *Gerald G. Kelly* for petitioners. *Francis L. Tetreault* for respondent. Reported below: 364 F. 2d 908.

No. 830. GRACE LINE, INC., ET AL. *v.* KANTON. C. A. 9th Cir. Certiorari denied. *Edward S. Franklin* for petitioners. *Sam L. Levinson* for respondent.

No. 770. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Edward Bennett Williams* and *Robert L. Weinberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 772. CARTER ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 5th Cir. Certiorari denied. *William VanDercreek* for petitioners. *Wayne Babler* and *Leroy Jeffers* for American Telephone & Telegraph Co. et al., and *Spencer C. Relyea III* for General Telephone Co. of the Southwest, respondents. Reported below: 365 F. 2d 486.

No. 773. MANDELL, SPECTOR, RUDOLPH CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Harold E. Kohn* and *William T. Coleman, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Alan S. Rosenthal* for the United States. Reported below: 364 F. 2d 889.

No. 775. CHECKER CAB CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 367 F. 2d 692.

No. 782. MADISON FUND, INC., FORMERLY PENNROAD CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *William R. Spofford* and *Sherwin T. McDowell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Melva M. Graney* for respondent. Reported below: 365 F. 2d 471.

No. 771. ROSEMONT ENTERPRISES, INC. *v.* RANDOM HOUSE, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Chester C. Davis* and *Lola S. Lea* for petitioner. *Horace S. Manges* for respondents. Reported below: 366 F. 2d 303.

No. 776. BANZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Walter H. Evans* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 367 F. 2d 865.

No. 780. PANCZKO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* and *Melvin B. Lewis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 367 F. 2d 737.

No. 783. SCHEIN, DBA HENRY SCHEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome T. Orans* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 784. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Robert M. Scott* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 366 F. 2d 575.

No. 785. BUTTERFIELD *v.* PLASTIC CONTACT LENS CO. C. A. 9th Cir. Certiorari denied. *Collins Mason* for petitioner. *Dugald S. McDougall, Irwin Panter, James C. Dezendorf* and *Carl Hoppe* for respondent. Reported below: 366 F. 2d 338.

No. 787. GRANT ET AL. *v.* SCHOOL DISTRICT No. 61, BAKER COUNTY. Sup. Ct. Ore. Certiorari denied. *Willard K. Carey* for petitioners. Reported below: 244 Ore. 131, 415 P. 2d 165.

No. 788. HARRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 367 F. 2d 826.

No. 790. HELBERG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jerome M. Johnson* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 365 F. 2d 314.

No. 792. CITY OF MESA *v.* SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT. Sup. Ct. Ariz. Certiorari denied. *J. LaMar Shelley* and *Mark Wilmer* for petitioner. *Irving A. Jennings* and *Rex E. Lee* for respondent. Reported below: 101 Ariz. 74, 416 P. 2d 187.

No. 798. WEST LOS ANGELES INSTITUTE FOR CANCER RESEARCH *v.* MAYER ET AL. C. A. 9th Cir. Certiorari denied. *Kenneth H. Anderson* for petitioner. *Charles M. Price, Hugh L. Biggs* and *Cleveland C. Cory* for respondents. Reported below: 366 F. 2d 220.

No. 802. COATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Robert J. O'Hanlon* and *Richard L. Daly* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 366 F. 2d 744.

No. 811. STATE LOAN & FINANCE CORP. *v.* AMERICAN PLAN CORP. C. A. 3d Cir. Certiorari denied. *Howard L. Williams* and *Robert M. High* for petitioner. *Leo H. Hirsch, Jr.*, for respondent. Reported below: 365 F. 2d 635.

No. 633. MCLAURIN ET AL. *v.* CITY OF GREENVILLE. Sup. Ct. Miss. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Jack Greenberg, Anthony G. Amsterdam* and *R. Jess Brown* for petitioners. *Charles S. Tindall, Jr.*, for respondent. Reported below: 187 So. 2d 854, 860, 861.

No. 714. ATLANTIC COAST LINE RAILROAD CO. *v.* HODGES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Paul A. Porter* and *Dennis G. Lyons* for petitioner. *Sam D. Hewlett, Jr.*, for respondents. Reported below: 363 F. 2d 534.

No. 725. KEOGH *v.* WASHINGTON POST CO. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Philip Handelman* for petitioner. *James H. McGlothlin* for respondent. Reported below: 125 U. S. App. D. C. 32, 365 F. 2d 965.

No. 236, Misc. CLARK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *James P. Simpson* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent. Reported below: 398 S. W. 2d 763.

No. 778. UNITED STATES EX REL. SHOTT *v.* TEHAN, SHERIFF. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Thurman Arnold* for petitioner. *Melvin G. Rueger* and *Calvin W. Prem* for respondent. Reported below: 365 F. 2d 191.

No. 81, Misc. HUNTER *v.* PRASSE. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Edward Friedman*, Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.*, Deputy Attorney General, for respondent.

No. 172, Misc. GRANADE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Parnell J. T. Callahan* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 837.

No. 188, Misc. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 360 F. 2d 92.

No. 382, Misc. IN RE BOYDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 438, Misc. CONNER *v.* WINGO, WARDEN. Ct. App. Ky. Certiorari denied. Petitioner *pro se*. *Robert Matthews*, Attorney General of Kentucky, and *George F. Rabe*, Assistant Attorney General, for respondent.

No. 562, Misc. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 363 F. 2d 425.

No. 443, Misc. CUPO ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Josiah Lyman* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 123 U. S. App. D. C. 324, 359 F. 2d 990.

No. 515, Misc. CARRILLO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Walter R. Jones*, Deputy Attorney General, for respondent. Reported below: 64 Cal. 2d 387, 412 P. 2d 377.

No. 615, Misc. AUSTIN *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Derald E. Granberg* and *Robert S. Shuken*, Deputy Attorneys General, for respondent.

No. 640, Misc. PRIMUS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Stanley D. Kupiszewski, Jr.*, Assistant Attorney General, for respondent.

No. 641, Misc. OSBORNE ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Fred Okrand* for petitioners. *Thomas C. Lynch*, Attorney General of California, *Arlo E. Smith*, Chief Assistant Attorney General, and *Doris H. Maier*, Assistant Attorney General, for respondent.

No. 645, Misc. DODGE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Petitioner *pro se*. *Phil L. Hansen*, Attorney General of Utah, and *Gary A. Frank*, Assistant Attorney General, for respondent. Reported below: 18 Utah 2d 63, 415 P. 2d 212.

No. 648, Misc. BALDWIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 175 Ct. Cl. 264.

No. 705, Misc. ELBEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 127.

No. 717, Misc. OLIVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 730, Misc. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 363 F. 2d 845.

No. 748, Misc. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 502.

No. 766, Misc. HAMILTON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Robert B. Sales* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *Joseph H. Eckert*, Assistant Attorney General, for respondent. Reported below: 401 S. W. 2d 80.

No. 795, Misc. WARD *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 799, Misc. DE LA PAZ *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 800, Misc. TALBOT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 64 Cal. 2d 691, 414 P. 2d 633.

No. 807, Misc. LEAK *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 808, Misc. CAMERON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Leon B. Polsky* for petitioner. *Malvina H. Guggenheim* for respondent.

No. 810, Misc. NEWSOME *v.* FLOWERS, ATTORNEY GENERAL OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 811, Misc. TORRES *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 812, Misc. NAILOR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 820, Misc. STONE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 824, Misc. NEWELL *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 362 F. 2d 538.

No. 831, Misc. SOLIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 833, Misc. LEHMAN *v.* FRYE, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 343, 220 N. E. 2d 235.

No. 834, Misc. McCLAIN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *John J. Cleary, Harry J. Stadin* and *J. Raymond Dyer* for petitioner. Reported below: 404 S. W. 2d 186.

No. 835, Misc. SOVIERO *v.* NEW YORK. Sup. Ct. N. Y., Queens County. Certiorari denied.

No. 837, Misc. WELLS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 838, Misc. EVANS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Anthony L. Fletcher* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, for respondent. Reported below: 364 F. 2d 305.

No. 840, Misc. McCRARY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* and *Jack W. Broadfield* for petitioner. Reported below: — Ind. —, 216 N. E. 2d 715.

No. 847, Misc. TAYLOR *v.* CITY OF GRIFFIN. Ct. App. Ga. Certiorari denied. *Howard Moore, Jr.,* and *Jack H. Ruffin, Jr.,* for petitioner. *William H. Beck, Jr.,* and *Robert H. Smalley, Jr.,* for respondent. Reported below: 113 Ga. App. 589, 149 S. E. 2d 177.

No. 850, Misc. HILLMAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Fla. Certiorari denied.

No. 855, Misc. GRANT *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 856, Misc. DANKS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 18 Utah 2d 212, 418 P. 2d 488.

No. 860, Misc. SMITH *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 865, Misc. URBANO *v.* DELOACH, ASSISTANT DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 866, Misc. CALLAHAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 867, Misc. SADDLER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 868, Misc. LEE *v.* COPINGER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 869, Misc. EBELL *v.* MCGEE ET AL. C. A. 9th Cir. Certiorari denied.

No. 870, Misc. DYSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 872, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 873, Misc. LYONS *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 876, Misc. BERRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 878, Misc. GLEATON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 883, Misc. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 65 Cal. 2d 41, 416 P. 2d 132.

No. 885, Misc. RULE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 362 F. 2d 215.

No. 887, Misc. JEFFERSON *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 366 F. 2d 353.

No. 890, Misc. BENNETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 893, Misc. FRIEND *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 895, Misc. KING *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 897, Misc. D'AMBROSIO *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Frank A. Lopez* for petitioner.

No. 898, Misc. WATSON *v.* GREMILLION, ATTORNEY GENERAL OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 902, Misc. WIMBERLEY *v.* MEYERS, JUDGE. C. A. 9th Cir. Certiorari denied.

No. 906, Misc. SPLITT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 594.

No. 903, Misc. BLACK *v.* CROCKER, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 909, Misc. SMITH *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 910, Misc. SHERIDAN *v.* ALABAMA. Ct. App. Ala. Certiorari denied. Reported below: 187 So. 2d 294.

No. 911, Misc. LAKAS *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 364 F. 2d 905.

No. 913, Misc. CASON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 267 N. C. 316, 148 S. E. 2d 137.

No. 916, Misc. MASSENGALE *v.* LESTER ET AL. Ct. App. Ky. Certiorari denied. Petitioner *pro se*. *Robert B. Halloran* for respondent Lester. Reported below: 403 S. W. 2d 697.

No. 918, Misc. ALEXANDER *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 1112, Misc. MYERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 311, 220 N. E. 2d 297.

No. 920, Misc. LESTER *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 922, Misc. RODRIGUEZ, AKA GILES *v.* JOHNSTON, STATE HOSPITAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 940, Misc. ELDRIDGE *v.* RICHFIELD OIL CORP. C. A. 9th Cir. Certiorari denied. *Lasher B. Gallagher* for petitioner. *Henry F. Walker* for respondent. Reported below: 364 F. 2d 909.

No. 644, Misc. ROMANO *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, for respondent. Reported below: 360 F. 2d 389.

No. 819, Misc. HAYNES *v.* REDERI A/S ALADDIN ET AL. C. A. 5th Cir. Motion of American Trial Lawyers Association for leave to file brief, as *amicus curiae*, granted. Certiorari denied. *Arthur J. Mandell* for petitioner. *Edward W. Watson* for respondents. *E. D. Vickery* and *Mayo J. Thompson* for Texas Employers' Insurance Association, intervenor below, on the briefs in opposition to the petition and to the motion. *Robert Klonsky* and *Philip F. DiCostanzo* for American Trial Lawyers Association, as *amicus curiae*, in support of the petition. Reported below: 362 F. 2d 345.

Rehearing Denied.

No. 19. ADDERLEY ET AL. *v.* FLORIDA, *ante*, p. 39;

No. 45. CICHOS *v.* INDIANA, *ante*, p. 76;

No. 89. WALKER *v.* SOUTHERN RAILWAY CO., *ante*, p. 196; and

No. 179. ATLAS SCRAPER & ENGINEERING CO. *v.* PURSCHE, *ante*, p. 846. Petitions for rehearing denied.

No. 469. LAYTON ET AL. *v.* SELB MANUFACTURING CO. ET AL., *ante*, p. 929;

No. 471. MILLER *v.* UDALL, SECRETARY OF THE INTERIOR, *ante*, p. 929;

No. 486. JOS. SCHLITZ BREWING CO. *v.* UNITED STATES ET AL., *ante*, p. 37;

No. 505. BADGLEY ET AL. *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL., *ante*, p. 114;

No. 509. DEVERS *v.* CAPITAL INVESTORS CO. ET AL., *ante*, p. 934;

No. 524. IZZI *v.* REZZOLLA ET AL., *ante*, p. 934;

No. 559. DRISCOLL *v.* TOLEDO BLADE CO., *ante*, p. 948;

No. 565. HIATT *v.* SAN FRANCISCO NATIONAL BANK ET AL., *ante*, p. 948;

No. 800. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MORRIS ET AL., *ante*, p. 231;

No. 169, Misc. GUY *v.* TAHASH, WARDEN, ET AL., *ante*, p. 12;

No. 174, Misc. MORFORD *v.* FOGLIANI, WARDEN, *ante*, p. 963;

No. 220, Misc. BAILEY *v.* YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN ATLANTA, INC., *ante*, p. 868;

No. 394, Misc. BANDY *v.* UNITED STATES ATTORNEY GENERAL, *ante*, p. 956;

No. 439, Misc. GEMMEL *v.* BUCHKOE, WARDEN, *ante*, p. 962;

No. 507, Misc. JONES *v.* MANCUSI, WARDEN, *ante*, p. 992;

No. 620, Misc. BOYDEN *v.* UNITED STATES, *ante*, p. 978;

No. 692, Misc. HILLIARD *v.* TEXAS, *ante*, p. 941;

No. 711, Misc. HAGINS *v.* REDEVELOPMENT COMMISSION OF GREENSBORO, *ante*, p. 952; and

No. 786, Misc. OOSTERWYK *v.* COUNTY OF MILWAUKEE ET AL., *ante* p. 981. Petitions for rehearing denied.

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JANUARY 11, 1967.

Dismissal Under Rule 60.

No. 402. PIONEER NATIONAL TITLE INSURANCE CO. *v.* UNITED STATES ET AL. Appeal from D. C. N. D. Ill. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Leo F. Tierney, Robert L. Stern* and *Warren M. Christopher* for appellant. *Solicitor General Marshall, Donald F. Turner, Robert B. Hummel* and *Milton J. Grossman* for the United States, and *Charles T. Martin* for Chicago Title & Trust Co. et al., appellees.

JANUARY 13, 1967.

Dismissal Under Rule 60.

No. 775, Misc., LINDSEY *v.* UNITED STATES. C. A. 6th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Warner Hodges* for petitioner. *Solicitor General Marshall* for the United States.

JANUARY 16, 1967.

Miscellaneous Orders.

No. 428. SECURITIES AND EXCHANGE COMMISSION *v.* UNITED BENEFIT LIFE INSURANCE CO. C. A. D. C. Cir. (Certiorari granted, *ante,* p. 918.) Motion of National Association of Securities Dealers, Inc., et al., for leave to file brief, as *amici curiae,* granted. *Marc A. White, Robert L. Augenblick* and *Joseph B. Levin* for National Association of Securities Dealers, Inc., et al., as *amici curiae,* in support of the petition. *Daniel J. McCauley, Jr.,* and *Morris L. Weisberg* for respondent, in opposition to the motion.

No. 993, Misc. CROOKE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 491. BOARD OF SUPERVISORS OF SUFFOLK COUNTY ET AL. *v.* BIANCHI ET AL. Appeal from D. C. E. D. N. Y. (Probable jurisdiction noted, *ante*, p. 966.) Motion to remove case from summary calendar denied. *Richard C. Cahn* for appellees Sammis et al. on the motion. *Stanley S. Corwin* for Board of Supervisors of Suffolk County, and *Pierre G. Lundberg* for Town of Southampton et al., appellants, in support of the motion.

No. 875, Misc. NEWSOME *v.* HOLMAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *Bernard F. Sykes* and *Walter S. Turner*, Assistant Attorneys General, for respondents.

Probable Jurisdiction Noted.

No. 914. UNITED STATES *v.* FIRST CITY NATIONAL BANK OF HOUSTON ET AL. Appeal from D. C. S. D. Tex. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted. Probable jurisdiction noted and case placed on summary calendar. Motion to advance filed by the Solicitor General, and joined in by the several appellees, granted. Case will be heard on the typewritten record with leave to the parties to print such portions of the record as they desire as appendices to their briefs. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Marshall* on the application for stay and motion to advance. *David T. Searls* for First City National Bank of Houston, *Leon M. Payne* for Southern National Bank of Houston, and *Joseph J. O'Malley* and *Eugene J. Metzger* for Acting Comptroller of the Currency Camp, in opposition to the motion for stay.

Certiorari Granted. (See also No. 13, *ante*, p. 493; No. 645, *ante*, p. 533; and No. 774, *ante*, p. 533.)

No. 744. WALDRON, EXECUTRIX *v.* CITIES SERVICE CO. C. A. 2d Cir. Certiorari granted. *Samuel M. Lane* for petitioner. *Simon H. Rifkind* and *Edward N. Costikyan* for respondent. Reported below: 361 F. 2d 671.

Certiorari Denied. (See also No. 892, Misc., *ante*, p. 536; and No. 929, Misc., *ante*, p. 536.)

No. 682. PASSINI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* and *Mitchell H. Caplan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 57.

No. 692. MORRISON MILLING CO. *v.* FREEMAN ET AL.; and

No. 693. GENERAL MILLS, INC., ET AL. *v.* FREEMAN ET AL. C. A. D. C. Cir. Certiorari denied. *William D. Neary* for petitioner in No. 692. *Howard C. Westwood* and *Brice M. Clagett* for petitioners in No. 693. *Solicitor General Marshall, Assistant Attorney General Sanders* and *David L. Rose* for respondents in both cases. Reported below: 124 U. S. App. D. C. 334, 365 F. 2d 525.

No. 736. D. I. OPERATING CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jack A. Donnelley* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Meyer Rothwacks* for the United States. Reported below: 362 F. 2d 305.

No. 832. JAMAICA TIME PETROLEUM, INC. *v.* FEDERAL INSURANCE CO. C. A. 10th Cir. Certiorari denied. *M. Lewis Lehman* for petitioner. *Martin J. Purcell* and *Lawrence Weigand* for respondent. Reported below: 366 F. 2d 156.

No. 777. DUKE POWER CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William I. Ward, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis, Howard O. Sigmond* and *Edmund B. Clark* for the United States. Reported below: 366 F. 2d 915.

No. 786. KELLY ET AL. *v.* CAPITAL INSURANCE & SURETY CO., INC. C. A. 9th Cir. Certiorari denied. *Finton J. Phelan, Jr.*, for petitioners. Reported below: 361 F. 2d 567.

No. 795. PERPETUAL ROYALTY CORP. ET AL. *v.* KIPFER ET AL. C. A. 10th Cir. Certiorari denied. *Robert S. Rizley* for petitioners. Reported below: 361 F. 2d 317.

No. 799. CONOLE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Bernard G. Segal* and *Samuel D. Slade* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 365 F. 2d 306.

No. 803. BAFICO *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari denied. *Thomas H. Ryan* for petitioner. Reported below: 364 F. 2d 36.

No. 809. SPOKANE, PORTLAND & SEATTLE RAILWAY CO. ET AL. *v.* ORDER OF RAILWAY CONDUCTORS & BRAKEMEN ET AL. C. A. 9th Cir. Certiorari denied. *Hugh L. Biggs* and *Cleveland C. Cory* for petitioners. *Harry E. Wilmarth* and *Clifford D. O'Brien* for respondents. Reported below: 366 F. 2d 99.

No. 818. HAGAN *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES ET AL. Super. Ct. Cal., County of L. A. Certiorari denied.

No. 812. PARKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Horace J. Donnelly, Jr.*, for petitioner Foundation for Divine Meditation, Inc. *Solicitor General Marshall, Assistant Attorney General Rogovin, Lee A. Jackson* and *Gilbert E. Andrews* for respondent. Reported below: 365 F. 2d 792.

No. 821. UNITED ELECTRICAL CONTRACTORS ASSOCIATION ET AL. *v.* ORDMAN ET AL. C. A. 2d Cir. Certiorari denied. *Leon Brickman* for petitioners. *Solicitor General Marshall, Arnold Ordman, pro se, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 366 F. 2d 776.

No. 822. UHLHORN *v.* U. S. GYPSUM CO. C. A. 8th Cir. Certiorari denied. *Joe C. Barrett* and *Walter P. Armstrong, Jr.*, for petitioner. *John M. Heiskell* for respondent. Reported below: 366 F. 2d 211.

No. 834. MILLSTEIN *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Leonard Feldman* for petitioner. *Angelo T. Cometa* for respondent. Reported below: 25 App. Div. 2d 129, 267 N. Y. S. 2d 732.

No. 840. PADUANO ET AL. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. *Abraham Wilson, David M. Potts* and *Max Gross* for petitioners. *J. Lee Rankin* for respondents.

No. 417, Misc. LOFLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 357 F. 2d 472.

No. 701. COLE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *R. Eugene Pincham, Charles B. Evins* and *Sam Adam* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 57.

No. 836. VIRGINIA EX REL. VIRGINIA STATE BAR *v.* BROTHERHOOD OF RAILROAD TRAINMEN. Sup. Ct. App. Va. Motion to use record in No. 34, October Term, 1963, granted. Certiorari denied. *Aubrey R. Bowles, Jr.*, and *Aubrey R. Bowles III* for petitioner. *Beecher E. Stallard, Edward B. Henslee, Jr.*, and *John J. Naughton* for respondent. Reported below: 207 Va. 182, 149 S. E. 2d 265.

No. 559, Misc. FORBUSH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 567, Misc. SMALLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sherman J. Saxl* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 363 F. 2d 417.

No. 606, Misc. CSOBOR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *Edward J. Dolan* and *William D. Danberry* for respondent.

No. 874, Misc. JEFFERSON *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. Reported below: 364 F. 2d 15.

No. 611, Misc. JIMENEZ *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Daniel J. Kremer* and *Edsel W. Haws,* Deputy Attorneys General, for respondent.

No. 655, Misc. ARMWOOD *v.* BROUGH, WARDEN. C. A. 4th Cir. Certiorari denied. *Arnold M. Weiner* for petitioner. *Robert C. Murphy,* Attorney General of Maryland, and *Robert F. Sweeney,* Deputy Attorney General, for respondent. Reported below: 359 F. 2d 854.

No. 668, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 673, Misc. THIBODEAU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wilfred C. Varn* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.,* for the United States. Reported below: 361 F. 2d 443.

No. 707, Misc. GANN *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. Petitioner *pro se.* *Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents.

No. 725, Misc. MOORE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Edward S. White* for petitioner. *Lewis R. Slaton* and *J. Walter LeCraw* for respondent. Reported below: 113 Ga. App. 738, 149 S. E. 2d 492.

No. 932, Misc. CAMPBELL *v.* FREEMAN, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 731, Misc. CACHOIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 364 F. 2d 291.

No. 735, Misc. CHROMIAK *v.* CALIFORNIA MENS COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Stanton Price*, Deputy Attorney General, for respondent.

No. 789, Misc. RAGSDALE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Petitioner *pro se*. *Jack P. F. Gremillion*, Attorney General of Louisiana, *William P. Schuler*, Assistant Attorney General, and *Albin P. Lassiter* for respondent. Reported below: 249 La. 420, 187 So. 2d 427.

No. 815, Misc. TERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 362 F. 2d 914.

No. 843, Misc. GREGORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 203.

No. 849, Misc. HODGDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 679.

No. 908, Misc. JENNINGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 364 F. 2d 513.

No. 928, Misc. COOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Dale Quillen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 365 F. 2d 246.

No. 936, Misc. COMULADA *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 941, Misc. GLASS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 943, Misc. YAGER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 407 S. W. 2d 413.

No. 949, Misc. LYONS *v.* MUNICIPAL COURT, NORTHERN JUDICIAL DISTRICT, COUNTY OF SAN MATEO, ET AL. C. A. 9th Cir. Certiorari denied.

No. 950, Misc. THOMAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 951, Misc. COLEMAN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Lewis A. Engman* for petitioner.

No. 958, Misc. NAILOR *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 968, Misc. WALKER *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 970, Misc. FIELDS *v.* NEW YORK. Sup. Ct. N. Y., Queens County. Certiorari denied.

No. 971, Misc. CANO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 974, Misc. TARALLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 976, Misc. SWITZER *v.* HALBERT, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 981, Misc. HOWARD *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 982, Misc. GREAR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 985, Misc. HORSLEY *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 986, Misc. STEVENS *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 366 F. 2d 565.

No. 997, Misc. STEPPE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 923, Misc. BALLOU *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *F. Lee Bailey* for petitioner. *Edward W. Brooke*, Attorney General of Massachusetts, and *Willie J. Davis*, Assistant Attorney General, for respondent. Reported below: 350 Mass. 751, 217 N. E. 2d 187.

No. 930, Misc. PEACE ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioners. *Aaron E. Koota* for respondent. Reported below: 18 N. Y. 2d 230, 219 N. E. 2d 419.

No. 975, Misc. DEMARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 365 F. 2d 57.

Rehearing Denied.

No. 640, October Term, 1963. COHEN *v.* NEW YORK, 375 U. S. 985. Motion for leave to file petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion.

No. 28. TRANSPORTATION-COMMUNICATION EMPLOYEES UNION *v.* UNION PACIFIC RAILROAD CO., *ante*, p. 157;

No. 51. FIRST NATIONAL BANK OF LOGAN *v.* WALKER BANK & TRUST CO., *ante*, p. 252;

No. 86. UNITED STATES *v.* ACME PROCESS EQUIPMENT CO., *ante*, p. 138;

No. 297. DEESEN *v.* PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA ET AL., *ante*, p. 846;

No. 614. COHEN *v.* NEW YORK, *ante*, p. 976;

No. 626. WALKER DISTRIBUTING CO. ET AL. *v.* LUCKY LAGER BREWING CO., *ante*, p. 976;

No. 665. KLEIN *v.* KLEIN, *ante*, p. 973;

No. 546, Misc. RIVERA *v.* UNITED STATES, *ante*, p. 938; and

No. 809, Misc. D'ERCOLE *v.* UNITED STATES, *ante*, p. 995. Petitions for rehearing denied.

No. 502. SITTON ET UX. *v.* AMERICAN TITLE CO. OF DALLAS ET AL., *ante*, p. 975. Petition for rehearing and for other relief denied.

No. 634. MINISTERS LIFE & CASUALTY UNION *v.* HAASE, COMMISSIONER OF INSURANCE, ET AL., *ante*, p. 205. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

JANUARY 20, 1967.

Dismissal Under Rule 60.

No. 551. UNITED STATES *v.* KILGORE ET AL. Appeal from D. C. S. D. Cal. (Probable jurisdiction noted, *ante*, p. 956.) Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Marshall* for the United States. *George M. Bryant* for appellee Kilgore.

JANUARY 23, 1967.

Miscellaneous Orders.

No. 159. MCCRAY *v.* ILLINOIS. Sup. Ct. Ill. (Certiorari granted, 384 U. S. 949.) Motion of petitioner for leave to file a supplemental brief after argument granted. *Sam Adam* and *R. Eugene Pincham* on the motion.

No. 914. UNITED STATES *v.* FIRST CITY NATIONAL BANK OF HOUSTON ET AL. Appeal from D. C. S. D. Tex. (Probable jurisdiction noted, *ante*, p. 1023.) Motion of appellees for additional time for oral argument granted and thirty additional minutes allotted to each side. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Eugene J. Metzger* for Comptroller of the Currency on the motion.

No. 1042, Misc. COLE *v.* WILLINGHAM, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 216. NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL. C. A. 7th Cir. (*Ante*, pp. 810, 943.) Motion of New York Times Display Advertising Salesmen Steering Committee for leave to file a brief, as *amicus curiae*, granted. *Martin C. Seham* on the motion.

No. 305. DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. (Probable jurisdiction noted, *ante*, p. 897.) Motion to remove case from summary calendar granted and an additional fifteen minutes allotted to each side. *Solicitor General Marshall* for the United States, and *Thomas D. Barr* and *Owen Jameson* for Railway Express Agency, Inc., et al., appellees, on the motion.

Probable Jurisdiction Noted.

No. 972. UNITED STATES *v.* PROVIDENT NATIONAL BANK ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted and case set for oral argument immediately following No. 914. Motion of appellees to expedite consideration granted and the expedited schedule for filing of briefs, consented to by the Solicitor General, adopted. Case will be heard on the typewritten record with leave to the parties to print such portions of the record as they desire as appendices to their briefs. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Marshall* and *Assistant Attorney General Turner* for the United States. *Frederic L. Ballard, Charles I. Thompson, Jr.*, and *Tyson W. Coughlin* for Provident National Bank et al., and *Philip L. Roache, Jr., Charles H. McEnerney, Jr.*, and *Joseph J. O'Malley* for Acting Comptroller of the Currency Camp, appellees. *Frederic L. Ballard* for appellees Provident National Bank et al., on the motion. Reported below: 262 F. Supp. 397.

Certiorari Granted. (See No. 68, *ante*, p. 554; No. 1025, Misc., *ante*, p. 650.)

Certiorari Denied. (See also No. 793, *ante*, p. 649; No. 820, *ante*, p. 650; and No. 584, Misc., *ante*, p. 648.)

No. 753. COHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon* and *Joshua J. Kancelbaum* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 366 F. 2d 363.

No. 816. KELLY *v.* GREER ET AL. C. A. 3d Cir. Certiorari denied. *William H. Arkin* for petitioner. *Elder W. Marshall* and *Richard F. Stevens* for respondent Greer. Reported below: 365 F. 2d 669.

No. 826. FOSTER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Steve Anderson* for petitioner. *Gary D. Gortmaker* and *Albin W. Norblad* for respondent. Reported below: 245 Ore. —, 417 P. 2d 1023.

No. 833. IN RE GRIMES. C. A. 10th Cir. Certiorari denied. *Harlan Grimes, pro se,* and *Harvey L. Davis* for petitioner. Reported below: 364 F. 2d 654.

No. 837. MAYFLOWER CONGREGATIONAL CHURCH *v.* BERKAW ET AL. Sup. Ct. Mich. Certiorari denied. *Loren T. Wood* for petitioner. *Alfred E. Lindbloom* for respondents. Reported below: 378 Mich. 239, 144 N. W. 2d 444.

No. 879. PENNSYLVANIA RAILROAD CO. ET AL. *v.* AMERICAN NATIONAL BANK & TRUST CO. Sup. Ct. Ill. Certiorari denied. *Cornelius P. Callahan* for petitioners. *Louis G. Davidson* for respondent. Reported below: 35 Ill. 2d 145, 219 N. E. 2d 529.

No. 841. COUNTRY MUTUAL INSURANCE CO. *v.* ANDEEN, ADMINISTRATOR, ET AL. Sup. Ct. Ill. Certiorari denied. *Jack E. Horsley* for petitioner. *Edward L. Eagle, Jr.*, for respondents.

No. 846. KANSAS CITY TRANSIT, INC. *v.* KANSAS CITY, MISSOURI. Sup. Ct. Mo. Certiorari denied. *Albert Thomson* and *Daniel L. Brenner* for petitioner. *Jack L. Simms* for respondent. Reported below: 406 S. W. 2d 18.

No. 848. SWIFT & CO., INC., ET AL. *v.* WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK. C. A. 2d Cir. Certiorari denied. *William J. Condon, William J. Colavito, William P. Woods, Arthur C. O'Meara* and *Earl G. Spiker* for Swift & Co., Inc., and *Edmund L. Jones* for Armour & Co., petitioners. *Louis J. Lefkowitz*, Attorney General of New York, for respondent. Reported below: 364 F. 2d 241.

No. 856. GORDON *v.* CITY OF WORCESTER ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Harry J. Melski* for respondent City of Worcester.

No. 861. JANOVIC *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *John W. Rood* for petitioner. Reported below: 101 Ariz. 203, 417 P. 2d 527.

No. 966. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *Bernard Kleiman, Elliot Bredhoff, Michael Gottesman, George Cohen, Nathan Lipson* and *Alfred Lawson* for petitioners. *Solicitor General Marshall, Assistant Attorney General Sanders* and *Alan S. Rosenthal* for the United States, and *Guy Farmer* and *William C. Treanor* for Union Carbide Corp., respondents. Reported below: 125 U. S. App. D. C. 349, 372 F. 2d 922.

No. 824. WILLIAMS ET AL. *v.* SHAFFER. Sup. Ct. Ga. Certiorari denied. *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston* and *Howard Moore, Jr.*, for petitioners. *Arthur K. Bolton*, Attorney General of Georgia, and *Harold N. Hill, Jr.*, and *Alfred L. Evans, Jr.*, Assistant Attorneys General, for respondent. Reported below: 222 Ga. 334, 149 S. E. 2d 668.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause.

The Georgia summary eviction statute provides that a landlord may oust a tenant in a very swift, expedient manner. The landlord files with a judge of the superior court or justice of the peace an affidavit that the tenant has held over or has failed to pay rent (Ga. Code Ann. § 61–301 (1966)); and the judge issues a dispossessory warrant ordering the sheriff to evict the tenant and his possessions. Ga. Code Ann. § 61–302 (1966). The tenant may arrest the proceedings and prevent his summary eviction by filing a counter-affidavit denying the landlord's allegations (Ga. Code Ann. § 61–303 (1966)) and thereby obtain a jury trial on the facts in issue. Ga. Code Ann. § 61–304 (1966). But in order to remain in possession and obtain a trial (see Ga. Code Ann. § 61–304 (1966)) the tenant must "tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the

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trial of the case." [1] Ga. Code Ann. § 61–303 (1966). If the tenant is not able to furnish the security bond, he is summarily evicted. The effect is that the indigent tenant is deprived of his shelter, and the life of his family is disrupted—all without a hearing—solely because of his poverty.

In this case, respondent, petitioners' landlord, obtained a dispossessory warrant after filing an affidavit that petitioners had failed to pay the rent. Petitioners attempted to file counter-affidavits raising a number of defenses, together with affidavits that they were unable to post security due to their indigency. Apparently the affidavits were rejected. Petitioners then petitioned the Superior Court attempting to arrest the summary eviction. They sought vacation of the dispossessory warrants and injunctions against the landlord and the sheriff restraining them from executing the warrants. Each petitioner offered to pay into the court registry any rents due or to become due during the pendency of the action. Their petitions were denied and the action dismissed. Thereafter, petitioners were summarily evicted. On appeal, the Georgia Supreme Court held that the case was moot because petitioners had been evicted.

The State, acting on the landlord's behalf, argues that certiorari should be denied on that ground. Whether

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[1] The security required is substantial. Ga. Code Ann. § 61–305 (1966) provides:

"If the issue specified in [§ 61–304] shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid . . . and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise . . . ."

The insurance companies which posted dispossessory bonds informed petitioners that it would be necessary for each petitioner to put up a cash collateral for double the rent for about six months, as well as pay a bond premium.

or not a case is moot is a federal question which must be resolved by this Court. The finding of mootness by the State Supreme Court is not binding on us. See *Ward* v. *Love County*, 253 U. S. 17, 22; *Love* v. *Griffith*, 266 U. S. 32, 33–44; *Liner* v. *Jafco, Inc.*, 375 U. S. 301. The mootness doctrine is a beneficial one, expressive of the need for adverse parties who will vigorously argue the conflicting contentions to the Court and a necessary one in light of the requirements of Article III. But if this case were held to be moot, no tenant would ever be able to bring the statute to this Court. His eviction would render the case moot and preclude a challenge to the very statute causing the eviction. The statute would be immune from the constitutional challenge. Perhaps I am wrong. But the point is so substantial as to require oral argument.

The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. See, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12; *Burns* v. *Ohio*, 360 U. S. 252; *Smith* v. *Bennett*, 365 U. S. 708. We have recognized that the promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal (*Burns* v. *Ohio*, *supra*), the right to file a habeas corpus petition (*Smith* v. *Ben-*

nett, supra), or the right to obtain a transcript necessary for appeal (*Griffin* v. *Illinois, supra*).

It is no answer to say that the Georgia procedure is fairer than the procedures of some States, whereby a tenant can be evicted without any opportunity for a hearing. Though a State may not constitutionally be required to afford a hearing before its process is used to evict a tenant, having provided one it cannot discriminate between rich and poor. It cannot consistently with the Equal Protection Clause provide a hearing in such a way as to discriminate against some "on account of their poverty." *Griffin* v. *Illinois, supra,* at 18.

The problem of housing for the poor is one of the most acute facing the Nation. The poor are relegated to ghettos and are beset by substandard housing at exorbitant rents. Because of their lack of bargaining power, the poor are made to accept onerous lease terms. Summary eviction proceedings are the order of the day. Default judgments in eviction proceedings are obtained with machine-gun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation. Lyford, The Airtight Cage (1966).[2] And see Schorr, Slums and Social Insecurity (1964).

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[2] "They have not the economic power to make themselves heard, and their official political representatives have built their power on the ghetto and are committed to its perpetuation. In New York City a vast, informal machinery funnels society's discipline and health problems into the West Ninety-third Streets, and just about every sector of the establishment participates in running the machinery or lubricating it: slumlords who rent to the dead as well as the living provided they get a good price for it and have immunity from fire, building, health, and rent regulations; the city employee who collaborates in the arrangement; the welfare and health departments that go along because they have no other alternative; judges who tap the slumlord on the wrist on the rare occasions when he is brought into court. Approval of the system is

The plight of the poor is being somewhat ameliorated by federal and state programs (particularly the Neighborhood Legal Services under OEO) and by private organizations dedicated to the representation of indigents in civil matters. This Court of course does not sit to cure social ills that beset the country. But when we are faced with a statute that apparently violates the Equal Protection Clause by patently discriminating against the poor and thereby worsening their already sorry plight, we should address ourselves to it. I would grant certiorari.

MR. JUSTICE BRENNAN is also of the opinion that the petition for a writ of certiorari should be granted.

No. 847. CORBEAN *v.* XENIA CITY BOARD OF EDUCATION. C. A. 6th Cir. Motion for leave to supplement petition for certiorari granted. Certiorari denied. *Victor F. Schmidt* for petitioner. *William B. Saxbe,* Attorney General of Ohio, *Philip Aultman* and *Robert H. Wead* for respondent. Reported below: 366 F. 2d 480.

No. 886. CHULICK *v.* NEW YORK CENTRAL RAILROAD CO. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Wayne D. Wisbaum* and *Edward H. Kavinoky* for petitioner. *Ogden R. Brown* for respondent.

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given by business leaders who lead the fight against adequate welfare and housing, prosperous financial institutions that refuse to lend money for private investment in slum rehabilitation; foundations that avoid any significant commitment to abolition of the slum; labor unions that have abandoned the low-paid worker and practice racial discrimination; and white and black political organizations that have a vested interest in segregation and race politics. When the slum is used as a concentration camp for the criminal and disabled, the virulence of all the diseases endemic in slum life is intensified." Lyford, *supra,* at xxi–xxii.

No. 342, Misc. SMITH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Thomas Kerrigan*, Deputy Attorney General, for respondent.

No. 511, Misc. COLLIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 360 F. 2d 1.

No. 720, Misc. ANDERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 749, Misc. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 948, Misc. STEVENSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 954, Misc. LAWRENCE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 955, Misc. GAMBLE *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 966, Misc. CAIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 35 Ill. 2d 184, 220 N. E. 2d 195.

No. 967, Misc. METCALF *v.* PATE, WARDEN. Cir. Ct., St. Clair County, Ill. Certiorari denied.

No. 972, Misc. BUSH *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 983, Misc. LAING *v.* FIELD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 989, Misc. MCNUTT *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 2d 572.

No. 992, Misc. LAMANNA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 995, Misc. FINLEY *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1022, Misc. EDWARDS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se*. *Malvina H. Guggenheim* for respondent.

No. 1029, Misc. MILLER *v.* ALABAMA. Ct. App. Ala. Certiorari denied. Reported below: 43 Ala. App. 287, 189 So. 2d 576.

No. 1100, Misc. KRUCHTEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Laurence Davis* for petitioner. Reported below: 101 Ariz. 186, 417 P. 2d 510.

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No. 48. HEIDER, ADMINISTRATOR *v.* MICHIGAN SUGAR CO., *ante*, p. 362;

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No. 679. BROWN *v.* FOLLIN, AUDITOR OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL., *ante*, p. 988; and

No. 780. PANCZKO *v.* UNITED STATES, *ante*, p. 1009. Petitions for rehearing denied.

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No. 841, Misc. WARRINER *v.* FERRARO ET AL., *ante*, p. 995. Petitions for rehearing denied.

No. 549. KELBERINE ET AL. *v.* SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL., *ante*, p. 989. Petition for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition.

No. 659. WISCONSIN *v.* MILWAUKEE BRAVES, INC., ET AL., *ante*, p. 990. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

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CRIMINAL LAW—Continued.

charging interstate carriage of quantity of "acknowledgments of purchase" for "use" in New Hampshire Sweepstakes states an offense under § 1953 as Congress manifested broad purpose of thwarting interstate movement of gambling paraphernalia by all persons except common carriers. United States v. Fabrizio, p. 263.

2. *Entrapment—Government informer.*—Entrapment was not established as a matter of law, for at most petitioner's investigator, who was also a government informer, afforded petitioner "opportunities or facilities" for the commission of a criminal offense, a far cry from entrapment. Osborn v. United States, p. 323.

3. *No obligation to arrest—Investigation of crime.*—Government was not obliged to arrest petitioner when it first had probable cause to do so, since law enforcement officers have no duty to halt a crime investigation when they have minimum evidence to establish probable cause. Hoffa v. United States, p. 293.

4. *Passports—Travel to Cuba—Immigration and Nationality Act of 1952.*—Since there was no allegation or proof that petitioner in departing from the United States for Cuba did not have a valid passport, although not "specifically endorsed" for Cuban travel, the conviction under § 215 (b) of the Act must be reversed in line with *United States* v. *Laub, ante,* p. 475. Travis v. United States, p. 491.

5. *Violation of 18 U. S. C. § 1503—"Endeavor" rather than "attempt."*—Since this statute makes an offense of any proscribed "endeavor," a term not burdened with the technicalities of the word "attempt," the fact that the investigator-informer did not approach the venireman and did not intend to approach him does not negate a violation of § 1503. Osborn v. United States, p. 323.

CUBA. See **Criminal Law,** 4; **Passports.**

DAMAGES. See **Constitutional Law,** V, 3; **Employer and Employee.**

DEPARTMENT OF STATE. See **Criminal Law,** 4; **Passports.**

DEPORTATION. See also **Immigration and Nationality Act.**

Administrative procedure—Burden of proof—Clear, unequivocal, and convincing evidence.—No deportation order may be entered unless the Government proves by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. Immigration Service, p. 276.

DISBARMENT. See **Attorneys; Constitutional Law,** VI, 1.

DISCHARGED EMPLOYEES. See **Employer and Employee.**

DISCIPLINARY PROCEEDINGS. See **Attorneys; Constitutional Law,** VI, 1.

DISCRETION. See **Supreme Court,** 2.

DISCRIMINATION. See **Constitutional Law,** III, 3; **Juries; Procedure,** 2.

DISPOSITION OF TRUST LANDS. See **New Mexico-Arizona Enabling Act.**

DISQUALIFICATION. See **Constitutional Law,** V, 2; **Jurisdiction,** 1.

DISTRICT COURTS. See **Interstate Commerce Commission,** 1, 3; **Judicial Review,** 1; **Jurisdiction,** 2; **Taxes,** 1–2.

DOMESTIC JUDGMENTS. See **Judgments.**

DOUBLE JEOPARDY. See **Constitutional Law,** I.

DRAMAS. See **Constitutional Law,** V, 3.

DRUGS. See **Constitutional Law,** IV, 2.

DUE PROCESS. See **Confessions; Constitutional Law,** II; VI, 2; **Criminal Law,** 3; **Evidence,** 1; **Procedure,** 1, 3, 6; **Trespass.**

DURESS. See **Constitutional Law,** VI, 2; **Evidence,** 1; **Procedure,** 1, 6.

EAVESDROPPING. See **Evidence,** 2; **Trial.**

ELECTION DISTRICTS. See **Constitutional Law,** III, 4.

ELECTIONS. See **Constitutional Law,** III, 1, 4; V, 2; **Jurisdiction,** 1.

ELECTRONIC EAVESDROPPING. See **Constitutional Law,** IV, 3; **Criminal Law,** 2, 5.

ELEVENTH AMENDMENT. See **Jurisdiction,** 2; **Taxes,** 1–2.

EMPLOYER AND EMPLOYEE. See also **Anti-Kickback Act; Injunctions; Labor; National Labor Relations Board,** 1–2; **Railroad Adjustment Board.**

Suit for money damages for wrongful discharge—Railway Labor Act—Exhaustion of administrative remedies.—Action by employee for damages against railroad for wrongful discharge in violation of collective bargaining agreement subject to the Act not barred by failure to pursue administrative remedies available under the Act at time of suit. Walker v. Southern R. Co., p. 196.

EMPLOYMENT CONTRACT. See **Constitutional Law,** II, 1–2; V, 1.

ENABLING ACTS. See **New Mexico-Arizona Enabling Act.**

ENDEAVORS. See **Constitutional Law,** IV, 3; **Criminal Law,** 2, 5.

ENTRAPMENT. See **Constitutional Law,** IV, 3; **Criminal Law,** 2, 5.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III; **Judgments; Juries; Procedure,** 2.

EVIDENCE. See also **Attorneys; Confessions; Constitutional Law,** VI, 2; **Criminal Law,** 2–5; **Deportation; Interstate Commerce Commission,** 1; **Judicial Review,** 2; **Juries; Naturalization; Passports; Procedure,** 1, 3, 6; **Trespass; Trial.**

1. *Admissibility—Threat of removal from office—Privilege against self-incrimination.*—Threat of removal from public office under state forfeiture-of-office statute to induce petitioners to forgo the privilege against self-incrimination rendered the resulting statements involuntary and inadmissible in the state criminal proceedings. Garrity v. New Jersey, p. 493.

2. *Monitored conversations between petitioner and counsel—Notes thereof available to government attorneys—New trial ordered.*—In view of Solicitor General's report that notes of monitored conversations between petitioner and his counsel were made available to government attorneys the case is remanded for a new trial to make certain that petitioner is accorded a trial free from any inadmissible evidence. Black v. United States, p. 26.

EXCLUSIVE REMEDY. See **Federal Prisoners.**

EXHAUSTION OF REMEDIES. See **Employer and Employee.**

FACILITIES. See **Natural Gas Act.**

FALSE STATEMENTS. See **Constitutional Law,** V, 3; **Judicial Review,** 2; **Naturalization.**

FEDERAL AGENTS. See **Constitutional Law,** IV, 2.

FEDERAL INSTRUMENTALITY. See **Jurisdiction,** 2; **Taxes,** 1–2.

FEDERAL LAND GRANTS. See **New Mexico-Arizona Enabling Act.**

FEDERAL POWER COMMISSION. See **Natural Gas Act.**

FEDERAL PRISONERS.

Compensation for injuries—Exclusive remedy under 18 U. S. C. § 4126—Federal Tort Claims Act.—The compensation system provided in § 4126 is the exclusive remedy for federal prisoners who are injured in prison employment, and an award thereunder bars recovery under the Federal Tort Claims Act. United States v. Demko, p. 149.

FEDERAL-STATE RELATIONS. See **Jurisdiction,** 2; **National Bank Act; Taxes,** 1–2.

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FEDERAL TORT CLAIMS ACT. See **Federal Prisoners.**

FEINBERG LAW. See **Constitutional Law,** II, 1–2; V, 1.

FICTIONALIZATION. See **Constitutional Law,** V, 3.

FIFTH AMENDMENT. See **Attorneys; Constitutional Law,** I; II, 4; IV, 1; VI, 2; VII, 2; **Criminal Law,** 3; **Evidence,** 1; **Procedure,** 5–6.

FIRST AMENDMENT. See **Constitutional Law,** V; **Jurisdiction,** 1; **Trespass.**

FLORIDA. See **Constitutional Law,** III, 4; **Judgments; Trespass.**

FOREIGN JUDGMENTS. See **Judgments.**

FOREIGN TRAVEL. See **Criminal Law,** 4; **Passports.**

FORFEITURE-OF-OFFICE STATUTE. See **Constitutional Law,** VI, 2; **Evidence,** 1; **Procedure,** 6.

FOURTEENTH AMENDMENT. See **Attorneys; Confessions; Constitutional Law,** I–III; VII, 1; **Evidence,** 1; **Judgments; Juries; Jurisdiction,** 1; **Procedure,** 1–3, 5–6; **Trespass.**

FOURTH AMENDMENT. See **Constitutional Law,** IV; **Criminal Law,** 2–3, 5.

FRAUD. See **Immigration and Nationality Act.**

FREEDOM OF SPEECH, PRESS AND ASSEMBLY. See **Constitutional Law,** V; **Jurisdiction,** 1; **Trespass.**

FULL FAITH AND CREDIT CLAUSE. See **Judgments.**

GAMBLING. See **Criminal Law,** 1.

GAS. See **Natural Gas Act.**

GEORGIA. See **Confessions; Constitutional Law,** III, 1, 3; V, 2; **Judgments; Juries; Jurisdiction,** 1; **Procedure,** 1–2.

GOVERNMENT AGENTS. See **Constitutional Law,** IV, 2.

GOVERNMENT CONTRACTS. See **Anti-Kickback Act.**

GOVERNMENT INFORMERS. See **Constitutional Law,** II, 4; IV, 1, 3; VII, 2; **Criminal Law,** 2–3, 5.

GOVERNOR. See **Constitutional Law,** III, 1.

GRAND JURIES. See **Constitutional Law,** III, 3; IV, 3; **Criminal Law,** 2, 5; **Juries; Procedure,** 2.

GRANTS. See **New Mexico-Arizona Enabling Act.**

GRIEVANCE PROCEDURES. See **National Labor Relations Board,** 1–2.

HABEAS CORPUS. See **Constitutional Law**, III, 2.

HABITUAL-CRIMINAL STATUTES. See **Constitutional Law**, II, 3; **Procedure**, 3.

HIGHWAYS. See **New Mexico-Arizona Enabling Act.**

HOME USED FOR BUSINESS. See **Constitutional Law**, IV, 2.

HORSE RACING. See **Criminal Law**, 1.

HOSTAGES. See **Constitutional Law**, V, 3.

IMMIGRATION AND NATIONALITY ACT. See also **Criminal Law**, 4; **Deportation**; **Judicial Review**, 2; **Naturalization**; **Passports.**

Deportation of aliens—Misrepresentation of status—Quota restrictions.—Section 241 (f) of the Act, which exempts from deportation an alien who obtained a visa and entry to this country by fraud and misrepresentation where the alien is the spouse, parent or child of an American citizen and was "otherwise admissible at the time of entry," is construed to save from deportation such aliens who misrepresented their status to evade quota restrictions. Immigration Service v. Errico, p. 214.

IMMUNITY. See **Jurisdiction**, 2; **Taxes**, 1–2.

IMPARTIAL JURY. See **Constitutional Law**, VII, 1.

INDIANA. See **Constitutional Law**, I.

INDICTMENTS. See **Criminal Law**, 1.

INDIGENTS. See **Constitutional Law**, III, 2.

INDISPENSABLE PARTY. See **Railroad Adjustment Board.**

INFORMERS. See **Constitutional Law**, II, 4; IV, 1, 3; VII, 2; **Criminal Law**, 2–3, 5.

INFRINGEMENTS. See **Procedure**, 4.

INJUNCTIONS. See also **Jurisdiction**, 2; **Labor**; **Procedure**, 4; **Taxes**, 1–2.

Labor—Refusal to bargain—New contract.—Court of Appeals' reversal of District Court's temporary injunction restraining employer from refusing to meet with union's designated representatives is set aside so that District Court can determine the effect of a new contract upon the appropriateness of injunctive relief, the proper standard for such relief under § 10 (j) of the National Labor Relations Act being immaterial if relief thereunder is now improper. McLeod v. General Electric, p. 533.

INJURIES. See **Federal Prisoners.**

INTERLOCUTORY ORDERS. See **Procedure**, 4.

INTERNATIONAL RATES. See **Interstate Commerce Commission**, 2.

INTERSTATE CARRIAGE OF BETTING MATERIALS. See **Criminal Law**, 1.

INTERSTATE COMMERCE. See **Natural Gas Act.**

INTERSTATE COMMERCE COMMISSION. See also **Judicial Review**, 1.

1. *Hearings—Judicial review—Evidence.*—ICC's action granting railroads' applications to provide additional service to Port District was supported by substantial evidence on the record viewed as a whole, and it was not the District Court's function to substitute its own conclusions for those which the ICC had fairly drawn from its findings. Illinois C. R. Co. v. Norfolk & W. R. Co., p. 57.

2. *Joint through international rate—Reparations proceeding—Payment by domestic carrier.*—Where domestic railroad enters into joint through international rate covering transportation to Canada, the Commission has jurisdiction in reparations proceeding to determine reasonableness of joint rate and to order domestic carrier to pay reparations in entire amount by which rate is unreasonable. Canada Packers v. A., T. & S. F. R. Co., p. 182.

3. *Judicial review—Order of District Court—Railroad rates.*—District Court's order setting aside on the merits ICC's dismissal of complaint that railroad rates were preferential and ordering ICC to grant appellee relief held unduly limited ICC's duty to reconsider the entire case. U. S. v. Saskatchewan Minerals, p. 94.

INVITEE. See **Constitutional Law**, IV, 2.

INVOLUNTARY MANSLAUGHTER. See **Constitutional Law**, I.

IOWA. See **Constitutional Law**, III, 2.

JAILS. See **Trespass.**

JOINT JUDGMENTS. See **Bankruptcy**; **Mootness.**

JOINT RATES. See **Interstate Commerce Commission**, 2.

JUDGES. See **Confessions**; **Procedure**, 1.

JUDGMENTS. See also **Bankruptcy**; **Mootness.**

Statute of limitations—Foreign judgments—Revival of judgments.—Since Georgia courts have construed its five-year statute of limitations on foreign judgments to bar suit on foreign judgment only if it cannot be revived in the State where it was obtained, all appellant need do is return to Florida, revive his judgment, and come back to Georgia and file suit within five years. Watkins v. Conway, p. 188.

JUDICIAL INQUIRY. See **Attorneys; Constitutional Law,** VI, 1.

JUDICIAL REVIEW. See also **Deportation; Interstate Commerce Commission,** 1; **National Labor Relations Board; Naturalization.**

1. *Interstate Commerce Commission—Hearings.*—It is not the District Court's function to substitute its conclusions for those which the ICC had fairly drawn from its findings, and that court had no basis for concluding that due process required a new hearing on the issues when the ICC had fully considered appellants' operations within the Port area as part of their overall plan. Illinois C. R. Co. v. Norfolk & W. R. Co., p. 57.

2. *Supreme Court—Two-court rule—Findings of fact.*—There is no basis here for disregarding this Court's policy that "it cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Berenyi v. Immigration Director, p. 630.

JURIES. See also **Confessions; Constitutional Law,** II, 4; III, 3; IV, 1, 3; VII, 1–2; **Criminal Law,** 2–3, 5; **Procedure,** 1–3.

Equal protection of the laws—Selection of jurors—Discrimination.—Proof offered by petitioners, including use by Georgia of a system of jury selection which had been previously condemned, constituted a prima facie case of purposeful discrimination, which shifted the burden of proof to the State. Whitus v. Georgia, p. 545.

JURISDICTION. See also **Constitutional Law,** V, 2; VI, 2; **Employer and Employee; Evidence,** 2; **Interstate Commerce Commission,** 2; **National Labor Relations Board,** 1–2; **Natural Gas Act; Procedure,** 6; **Railroad Adjustment Board; Taxes,** 1–2.

1. *Supreme Court—Disqualification of state legislator—First Amendment.*—The Supreme Court has jurisdiction to determine whether a disqualification for the office of state legislator under color of a proper constitutional standard violates the First Amendment. Bond v. Floyd, p. 116.

2. *Three-judge court—Enjoining state tax—Federal instrumentality.*—Three-judge court had jurisdiction to enjoin a state tax upon the Red Cross, an organization claiming immunity as a federal instrumentality. Dept. of Employment v. U. S., p. 355.

KEY EMPLOYEES. See **Anti-Kickback Act.**

KICKBACKS. See **Anti-Kickback Act.**

KNOWLEDGE. See **Bankruptcy; Mootness.**

LABOR. See also **Employer and Employee; Federal Prisoners; Injunctions; National Labor Relations Board,** 1–2; **Railroad Adjustment Board.**

Refusal to bargain—Injunction—New contract.—Court of Appeals' reversal of District Court's temporary injunction restraining employer from refusing to meet with union's designated representatives is set aside so that District Court can determine the effect of a new contract upon the appropriateness of injunctive relief. McLeod v. General Electric, p. 533.

LAKE CALUMET HARBOR PORT. See **Interstate Commerce Commission,** 1; **Judicial Review,** 1.

LAWYERS. See **Attorneys; Constitutional Law,** VI, 1; VII, 2; **Criminal Law,** 2–3, 5.

LEASES. See **Interstate Commerce Commission,** 1; **Judicial Review,** 1.

LEGISLATORS. See **Constitutional Law,** V, 2; **Jurisdiction,** 1.

LEGISLATURES. See **Constitutional Law,** III, 1, 4.

LOYALTY PROCEDURES. See **Constitutional Law,** II, 1–2; V, 1.

MAGAZINES. See **Constitutional Law,** V, 3.

MAJORITY VOTE. See **Constitutional Law,** III, 1.

MALAPPORTIONMENT. See **Constitutional Law,** III, 1, 4.

MANSLAUGHTER. See **Constitutional Law,** I.

MARIHUANA. See **Constitutional Law,** IV, 2.

MATERIAL SITES. See **New Mexico-Arizona Enabling Act.**

MEANINGFUL ASSOCIATION. See **Judicial Review,** 2; **Naturalization.**

MISREPRESENTATION. See **Immigration and Nationality Act.**

MONITORING. See **Evidence,** 2; **Trial.**

MOOTNESS. See also **Bankruptcy; Constitutional Law,** II, 1–2; V, 1; **Injunctions; Labor.**

Joint judgment—Payment by one party—Suit for contribution.—Payment by payee of check of a joint judgment against payee and the bank does not moot the case since the payee can still sue the petitioner bank for contribution. Bank of Marin v. England, p. 99.

MOTIONS. See **Procedure,** 4.

MURDER. See **Constitutional Law,** III, 3; **Juries; Procedure,** 2.

NARCOTICS. See **Constitutional Law,** IV, 2.

NATIONAL BANK ACT.

Branch banks—Competitive equality between national and state banks.—The provisions of the Act, 12 U. S. C. § 36 (c), place national and state banks on a basis of "competitive equality" as far as branch banking is concerned, and national banks may establish branches only in accordance with all requirements and conditions applicable to state banks by state law. First Nat. Bank v. Walker Bank, p. 252.

NATIONAL EMERGENCY. See **Criminal Law,** 4; **Passports.**

NATIONAL LABOR RELATIONS BOARD. See also **Injunctions; Labor.**

1. *Arbitration—Collective bargaining agreement—Unfair labor practice.*—The compulsory arbitration provision in the collective bargaining agreement did not preclude the NLRB from finding that the employer committed an unfair labor practice by refusing to furnish the union with information necessary to the proper performance of its representative duties. NLRB v. Acme Industrial Co., p. 432.

2. *Collective bargaining agreement—Premium pay plan—Unfair labor practice.*—NLRB was not without jurisdiction to adjudicate an unfair labor practice charge merely because its decision required the interpretation of a provision of the collective bargaining agreement relied on as a defense by the employer. NLRB v. C & C Plywood Corp., p. 421.

NATIONAL QUOTAS. See **Immigration and Nationality Act.**

NATURAL GAS ACT.

Jurisdiction of FPC—Abandonment of facilities—Approval by FPC.—Petitioner's refusal to continue receiving natural gas for transportation in interstate commerce constituted an abandonment of "facilities" and "service" which, under § 7 (b) of the Act, required FPC approval. United Gas Pipe Line v. FPC, p. 83.

NATURALIZATION. See also **Judicial Review,** 2.

Petition for naturalization—Burden of proof.—In naturalization proceedings, as distinguished from deportation or denaturalization cases where the Government must prove its case by clear, unequivocal, and convincing evidence, the burden is on the alien to show his eligibility in every respect. Berenyi v. Immigration Director, p. 630.

NEGROES. See **Constitutional Law,** III, 3; V, 2; **Juries; Jurisdiction,** 1; **Procedure,** 2.

NEW HAMPSHIRE SWEEPSTAKES. See **Criminal Law,** 1.

NEW JERSEY. See **Constitutional Law,** VI, 2; **Evidence,** 1; **Procedure,** 6.

NEW MEXICO-ARIZONA ENABLING ACT.

Disposition of trust lands—State highway use.—Consistent with the essential purposes of the Act, the restrictions on the manner of disposition of trust lands are not applicable to acquisitions by the State for its highway program, but the State must compensate the trust in money for the full appraised value of any material sites or rights of way it obtains over the trust lands. Lassen v. Arizona Highway Dept., p. 458.

NEWSWORTHY ITEMS. See **Constitutional Law,** V, 3.

NEW TRIAL. See **Evidence,** 2; **Trial.**

NEW YORK. See **Attorneys; Constitutional Law,** II, 1–2; V, 1, 3; VI, 1.

NON-COMMUNIST CERTIFICATE. See **Constitutional Law,** II, 1–2; V, 1.

NOTICE. See **Bankruptcy; Mootness.**

OATHS. See **Constitutional Law,** II, 1–2; V, 1–2; **Judicial Review,** 2; **Jurisdiction,** 1; **Naturalization.**

OFFENSES. See **Constitutional Law,** I.

OHIO. See **Procedure,** 5.

OVERBREADTH. See **Constitutional Law,** II, 1–2; V, 1.

OVERLAPPING OFFENSES. See **Constitutional Law,** I.

PARTIES. See **Railroad Adjustment Board.**

PASSPORTS. See also **Criminal Law,** 4.

Area restrictions—Travel to Cuba—Validity of passports.—Area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b) of the Immigration and Nationality Act of 1952. United States v. Laub, p. 475; Travis v. United States, p. 491.

PERIODICALS. See **Constitutional Law,** V, 3.

PERSONAL INJURIES. See **Federal Prisoners.**

PETITION FOR NATURALIZATION. See **Judicial Review,** 2; **Naturalization.**

PETIT JURIES. See **Constitutional Law,** II, 3; III, 3; VII, 1; **Juries; Procedure,** 1–3.

PHOTOGRAPHS. See **Constitutional Law,** V, 3.

PLAYS. See **Constitutional Law,** V, 3.

POLICE OFFICERS. See **Constitutional Law,** VI, 2; **Evidence,** 1; **Procedure,** 6.

POOR PERSONS. See **Constitutional Law,** III, 2.

POPULATION VARIANCES. See **Constitutional Law,** III, 4.

PORT DISTRICTS. See **Interstate Commerce Commission,** 1; **Judicial Review,** 1.

POST-CONVICTION PROCEEDINGS. See **Constitutional Law,** III, 2.

POVERTY. See **Constitutional Law,** III, 2.

PREFERENTIAL RATES. See **Interstate Commerce Commission,** 3.

PREMIUM PAY PLAN. See **National Labor Relations Board,** 2.

PRETRIAL PROCEDURE. See **Procedure,** 4.

PRICE INCREASES. See **Natural Gas Act.**

PRIME CONTRACTORS. See **Anti-Kickback Act.**

PRIOR CONVICTIONS. See **Constitutional Law,** II, 3; **Procedure,** 3.

PRISON EMPLOYMENT. See **Federal Prisoners.**

PRISONERS. See **Constitutional Law,** III, 2; **Federal Prisoners.**

PRISONS. See **Trespass.**

PRIVACY. See **Constitutional Law,** IV, 2; V, 3.

PRIVILEGE. See **Attorneys; Constitutional Law,** VI; **Evidence,** 1–2; **Procedure,** 5–6; **Trial.**

PROCEDURE. See also **Constitutional Law,** I; II, 3; III, 2–3; VI, 1–2; **Deportation; Employer and Employee; Evidence,** 1–2; **Injunctions; Interstate Commerce Commission,** 3; **Judicial Review,** 1–2; **Juries; Labor; Naturalization; Railroad Adjustment Board; Supreme Court,** 2; **Trial.**

1. *Criminal law—Confessions—Finding of voluntariness by trial judge.*—The trial judge need not make formal findings of fact or write an opinion, but it must clearly appear from the record that he made a primary finding of voluntariness before the confession was introduced into evidence before the jury. Sims v. Georgia, p. 538.

2. *Criminal law—Discrimination in jury selection—Retrial.*—Persons whose state court convictions are set aside for jury discrimination may be retried by the State under procedures which conform to constitutional requirements. Whitus v. Georgia, p. 545.

PROCEDURE—Continued.

3. *Criminal law—Recidivist statutes—Due process.*—Texas' use of prior convictions in the petitioners' current criminal trials did not offend the provisions of the Due Process Clause of the Fourteenth Amendment. Spencer v. Texas, p. 554.

4. *Denial of motion for summary judgment granting a permanent injunction—Not "interlocutory"—Not appealable under 28 U. S. C. § 1292 (a) (1).*—Since denial of motion for summary judgment granting permanent injunction related only to pretrial procedures and not to the merits, it was not "interlocutory" and therefore not appealable under § 1292 (a) (1). Switzerland Assn. v. Horne's Market, p. 23.

5. *Self-incrimination Clause—Comment on failure to testify—Failure to object at trial.*—Petitioner's failure to object at trial and during appeal in state courts to prosecutor's comment on his failure to testify in criminal trial which resulted in his conviction, review of which was being sought in this Court when *Griffin* v. *California* was decided, held not to foreclose petitioner's right to attack as unconstitutional the practice of making such comment following its invalidation in *Griffin*. O'Connor v. Ohio, p. 92.

6. *Supreme Court—Jurisdiction issue postponed—Appeal dismissed and certiorari granted.*—New Jersey's forfeiture-of-office statute is too tangentially involved to satisfy the requirements of 28 U. S. C. § 1257 (2); the appeal is dismissed, the papers are treated as a petition for certiorari, and certiorari is granted. Garrity v. New Jersey, p. 493.

PRODUCTION OF RECORDS. See **Attorneys**; **Constitutional Law**, VI, 1.

PROOF. See **Constitutional Law**, III, 3; **Criminal Law**, 4; **Judicial Review**, 2; **Juries**; **Naturalization**; **Passports**; **Procedure**, 2.

PROSECUTORS. See **Procedure**, 5.

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PUBLICITY. See **Constitutional Law**, V, 3.

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PUNISHMENT. See **Constitutional Law**, II, 3; **Procedure**, 3.

QUALIFICATIONS. See **Constitutional Law**, V, 2; **Jurisdiction**, 1.

QUOTA RESTRICTIONS. See **Immigration and Nationality Act.**

RACING. See **Criminal Law**, 1.

RAILROAD ADJUSTMENT BOARD.

Work-assignment dispute — Automation — Collective bargaining agreements.—The Board must exercise its exclusive jurisdiction to settle entire work-assignment dispute between competing unions in one proceeding. Transportation Union v. U. P. R. Co., p. 157.

RAILROAD RATES. See **Interstate Commerce Commission**, 2–3.

RAILROADS. See **Employer and Employee; Interstate Commerce Commission**, 1–3; **Judicial Review**, 1; **Railroad Adjustment Board.**

RAILWAY LABOR ACT. See **Employer and Employee; Railroad Adjustment Board.**

RATE INCREASES. See **Natural Gas Act.**

RATES. See **Interstate Commerce Commission**, 2–3.

REAPPORTIONMENT. See **Constitutional Law**, III, 4.

RECEIPTS. See **Criminal Law**, 1.

RECIDIVIST STATUTES. See **Constitutional Law**, II, 3; **Procedure**, 3.

RECKLESS HOMICIDE. See **Constitutional Law**, I.

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RED CROSS. See **Jurisdiction**, 2; **Taxes**, 1–2.

REFEREES. See **Bankruptcy; Mootness.**

REFUSAL TO BARGAIN. See **Injunctions; Labor; National Labor Relations Board**, 1–2.

REFUSAL TO TESTIFY. See **Attorneys; Constitutional Law**, VI, 1.

REMEDIES. See **Employer and Employee; Federal Prisoners.**

REPARATIONS. See **Interstate Commerce Commission**, 2.

REPRESENTATIVES. See **Constitutional Law**, V, 2; **Jurisdiction**, 1.

REVIVAL OF JUDGMENTS. See **Judgments.**

RIFLES. See **Anti-Kickback Act.**

RIGHT OF PRIVACY. See **Constitutional Law**, V, 3.

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RIGHT TO TRAVEL. See **Criminal Law**, 4; **Passports.**

RULES. See **Supreme Court**, 2.

ST. LAWRENCE SEAWAY. See **Interstate Commerce Commission**, 1; **Judicial Review**, 1.

SALE OF TRUST LANDS. See **New Mexico-Arizona Enabling Act.**

SALES. See **Natural Gas Act.**

SEARCH AND SEIZURE. See **Constitutional Law**, IV; **Criminal Law**, 2–3, 5.

SECRET INFORMERS. See **Constitutional Law**, II, 4; IV, 1, 3; VII, 2; **Criminal Law**, 2–3, 5.

SEDITION. See **Constitutional Law**, II, 1–2; V, 1.

SEGREGATION. See **Trespass.**

SELECTIVE SERVICE LAWS. See **Constitutional Law**, V, 2; **Jurisdiction**, 1.

SELF-INCRIMINATION. See **Attorneys**; **Constitutional Law**, II, 4; IV, 1; VI; VII, 2; **Criminal Law**, 3; **Evidence**, 1–2; **Procedure**, 5–6.

SENTENCES. See **Constitutional Law**, II, 3; **Procedure**, 3.

SERVICE. See **Natural Gas Act.**

SIXTH AMENDMENT. See **Constitutional Law**, VII; **Criminal Law**, 3.

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STATE DEPARTMENT. See **Criminal Law**, 4; **Passports.**

STATE EMPLOYEES. See **Constitutional Law**, II, 1–2; V, 1; VI, 2; **Evidence**, 1; **Procedure**, 6.

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SUBVERSIVE ORGANIZATIONS. See **Constitutional Law**, II, 1–2; V, 1.

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SUMMARY JUDGMENT. See **Procedure**, 4.

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1. Assignment of Mr. Justice Reed (retired) to the United States Court of Claims, p. 802.

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2. *Tax Injunction Act—Suit by United States—Eleventh Amendment.*—The Act, which prohibits district courts from enjoining the collection of state taxes where a "plain, speedy and efficient" state-court remedy is available, does not restrict a suit by the United States to enjoin the unconstitutional imposition of state taxes; nor does the Eleventh Amendment bar the action. Dept. of Employment v. U. S., p. 355.

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1. *"Endeavors."*—18 U. S. C. § 1503. Osborn v. United States, p. 323.

2. *"Use."*—18 U. S. C. § 1953. United States v. Fabrizio, p. 263.

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U. S. GOVERNMENT PRINTING OFFICE : 1967 O - 233-653